



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**ELECTION PETITION NO. 2 OF 2017**

**JOSEPH MAKILAP KIPKOROS.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**JOSEPH LEMBO MASINDET.....2<sup>ND</sup> RESPONDENT**

**WILLIAM CHEPTUMO KIPKIROR.....3<sup>RD</sup> RESPONDENT**

**AND**

**MUMA & KANJAMA ADVOCATES.....1<sup>ST</sup> INTERESTED PARTY**

**OG LAW LLP ADVOCATES.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. By Notice of Motion dated 28/11/18, the 1<sup>st</sup> Interested Party seeks the following orders:

*1) That this Application be certified urgent and heard ex-parte in the first instance.*

*2) That this Honourable Court be pleased to issue an Order directed at Petitioner to deposit Kshs. 1,500,000.00 being the balance amount on the party to party costs owed to the 3<sup>rd</sup> Respondent in Court within the next 21 days pending hearing and determination of this Application.*

*3) That this Honourable Court be pleased to issue an Order that out of the amount so deposited under prayer 2 above, Kshs. 1,000,000.00 be released to the 1<sup>st</sup> Interested Party herein.*

*4) That in default of the Petitioner depositing the sums under prayer 2 within the next 21 days execution do hereby issue against him.*

*5) That the costs of this Application be provided for.*

2. The 3<sup>rd</sup> Respondent has through his Advocate on the record (the 2<sup>nd</sup> Interested Party) raised a Preliminary Objection as follows:

**NOTICE OF PRELIMINARY OBJECTION**

**TAKE NOTICE** that the 3<sup>rd</sup> Respondent shall raise a Preliminary Objection against these proceedings at the hearing of the Application dated [28/11/18] on the following points of law:

*1) The proceedings herein are fatally defective as its implication amounts to garnishee proceedings outside the confines of law.*

*2) The Election Act and the Election Rules do not provide for provision for joinder of Advocates into proceedings for purposes of pursuing costs.*

3) The Court has no jurisdiction to collect party and party costs on behalf of an advocate.

**DATED at NAIROBI this 17<sup>th</sup> day of DECEMBER 2018**

3. Counsel for the parties made respective submissions on the Preliminary Objection and ruling was reserved. Counsel for the Petitioner supported the case of the 3<sup>rd</sup> Respondent as regards the competence of the Notice of Motion of 28/11/18.

4. Upon considering the application and the Preliminary Objection thereto together with the Counsel's submission, the Court frames the following issues for determination:

(a) *Whether lien possible in the circumstances of the cases.*

(b) *Whether the Court has jurisdiction to consider the matter raised in the Notice of Motion dated 28/11/14 or it is functus officio.*

(c) *Whether Advocate may be joined as Interested Party in an Election Petition for purposes of seeking recovery of costs from his client party to the Election Petition.*

**(a) Whether lien possible in the circumstances of the cases.**

5. Black's Law Dictionary at page 94 **defines** "lien" as follows:

*"A legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied."*

As regards the advocate – client relationship, Black's Law Dictionary sets out Attorney's lien as *"the right of an attorney or property (a **retaining lien**) or to encumber money payable to the client (a **charging lien**) until the attorney's fees have been properly determined and paid."* Ibid.

Obviously, the objection by Counsel on record for the 3<sup>rd</sup> Respondent that the Interested Party could not pursue the lien as he did not have in his possession the client's property is not well founded. It would appear that Counsel had in mind in making the objection the *"general lien" defined as* "A possessory lien by which the **lien-holder** may retain any of the debtor's goods in the lien holder's possession until any debt due from the debtor, whether in connection with retained goods or otherwise has been paid," or *"garnishment lien" defined as* "a lien on a debtor's property held by a garnishee." *ibid* at 942.

The 3<sup>rd</sup> Respondent's objection no. 1 on the Preliminary Objection would apply to *"garnishee lien,"* or possessory lien.

The Interested Party's claim to a lien is an encumbrance rather than possessory. I would therefore reject this point of objection to the Notice of Motion dated 28/11/18.

**(b) Whether the Court has jurisdiction to consider the matter raised in the Notice of Motion dated 28/11/18 or it is functus officio.**

6. *"Functus officio"*, Latin for *"having performed his or her office"* is defined in Black's Law Dictionary as follows:

*"(of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."*

The answer to the point of Preliminary Objection thereon depends on the duties, functions and jurisdiction of the Election Court.

7. The Election Court has a general jurisdiction to *"award the costs of and incidental to a petition and such costs shall follow the cause."* See section 84 of the Elections Act No. 24 of 2011. However, the execution of orders as to costs is governed by Rules 30 and 31 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 as follows:

#### **COSTS AND DEPOSITS**

##### **Costs.**

**30. (1)** *The Court shall, at the conclusion of a petition, make an order specifying—*

(a) *The total amount of costs payable; and*

(b) *The persons by and to whom the costs shall be paid.*

(2) *When making an order under sub rule (1), the court may —*

(a) *Disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or*

unfounded objections, on the part of either the petitioner or the respondent; and

(b) Impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

(3) The abatement of a petition shall not affect the liability of the petitioner or of any other person to the payment of costs previously incurred. Taxation and recovery of costs.

31. (1) The Registrar shall tax costs of a petition upon the order of the Court in the same manner as costs are taxed in civil proceedings and in accordance with the Civil Procedure Act.

(2) An order of the Registrar under sub-rule (1) shall be confirmed in the relevant Court.

(3) An election Court may direct that the whole or any part of any money deposited by way of security shall be applied in the payment of taxed costs.

8. At first glance, it would appear that upon exercising the jurisdiction to award costs under Rule 30 of the Election Petition Rules, the jurisdiction of the Election Court as defined in the Elections Act and Rules over costs is exhausted save for the limited provision for confirmation of taxed cost and directions as to the disposal of the security – deposit for payment of taxed costs under Rule 31 (2) and (3) of the Rules.

9. The recovery of the costs of execution proceedings therefor must, accordingly, follow the usual procedure of “*the Civil Proceedings in accordance with the Advocates Act (Cap 16).*”

10. As regards Party and Party costs, that execution procedure of Order 22 of the Civil Procedure Rules would apply. As for Advocate-client costs, as the case here, the statutory provisions of section 48 of the Advocates Act apply as follows:

#### **48. Action for recovery of costs**

(1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court’s jurisdiction, in which event action may be commenced before expiry of the period of one month.

(2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.

(3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.

11. Because such a suit for recovery of costs may be brought “*in any Court of competent jurisdiction*” and section 11 of the Civil Procedure Act provides for filing of suits in “*the Court of the lowest grade competent to try it*”, the recovery of the costs herein pegged to a ceiling of Ksh. 2,000,000/= could have been filed before a Magistrate’s Court of Resident Magistrate’s class with a pecuniary jurisdiction of 5,000,000/=. See Magistrate’s Court’s Act, 2015.

12. Section 48 of the Advocate’s Act, however, appears to be only a permissive provision for the filing of a suit before a competent Court for recovery of costs due to an Advocate. There exists an additional avenue under section 52 of the Act for the enforcement of payment of costs to an Advocate by the Court “***in which an Advocate has been employed***” – in this case the Election Court, as follows:

#### **52. Charging orders**

Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time **declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter**, and may make orders for the taxation of the costs and for raising money to pay or **for paying the costs out of the property so charged as it thinks fit**, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the advocate: Provided that no order shall be made if the right to recover the costs is barred by limitation.

Moreover, the residuary jurisdiction of Election Court could extend to issuing a Notice to Show Cause as to disposal of security for costs deposited into Court.

13. Could the Election Court be held, in these circumstances, to be “*functus officio*” as regards costs in view of section 52 of the Advocates Act? I think not. Although, the Election Court has exercised its jurisdiction in awarding costs under section 84 of the Elections Act and the Deputy Registrar of the Court has taxed costs in accordance with Rule 31 of the Election Petition Rules 2017, and notwithstanding the provision for the filing of a recovery suit under section 48 (2) of the Advocates Act, there remains the declaratory jurisdiction to make charging orders in enforcement no doubt of a **charging lien** under section 52 of the Advocates Act.

I would, therefore, find that the Election Court has jurisdiction to deal with the application of 28/11/18.

14. I respectfully agree with Kimaru, J. in **James Gitau Singh t/a Singh Gitau Advocates v. National Bank Ltd** (2009) eKLR where the learned Judge noted as follows:

*“As regard the applicants’ application seeking entry of Judgment on the amount taxed, I hold that the applicant cannot obtain judgment in the advocate-client bill costs was taxed.*

*The purposes of filing the Miscellaneous Cause is to have the advocate’s bill of costs taxed. It is for nothing else. The applicant is required to file suit by way of plaint if it desires to enforce payment of the amount that has been taxed in his favour.”*

The situation before the Court, however, is different. It is not a Miscellaneous Cause for taxation of Advocate-client Bill of Cost. It is the main suit, in Petition which the advocate conducted business on behalf of his client and section 52 of the Advocates Act, set out above, applies.

**(c) Whether Advocate may be joined as Interested Party in an Election Petition for purposes of seeking recovery of costs from his client party to the Election Petition**

15. Section 80 (d) of the Election Act provides for the exercise of its jurisdiction without undue regard to technicality as follows:

**80. Powers of election Court**

(1) An election may, in the exercise of its jurisdiction –

(a) Summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by Court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;

(b) Compel the attendance of any person as a witness who appears to the Court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;

(c) Examine a witness who is compelled to attend or any other person who has not been called as a witness in Court, and examined by a party to the petition and after examination the witness may be cross examined by or behalf of the petitioner and respondent or either of them; and

(d) Decide all matters that come before it would undue regard to technicalities.

16. There is nothing in the provisions of section 52 of the Advocates Act to suggest that the powers of the Court under that section cannot be moved by an Interested Party being the Advocate seeking to benefit from the charging order. If the Election Court has the residuary jurisdiction to make orders for payment of costs out of the security deposit and for section 52 charging orders, there is no reason why the Advocate who seeks such orders cannot, for purposes of such application move the Court as an Interested Party.

17. If the affordable resolution of Election Petitions as one of the objectives of the Rules under Rule 4 (1) of the Election Petition Rules 2017 is to be achieved, the requirement of a separate suit by the Advocate under section 48 of the Advocates Act instead of an application pursuant to section 52 of the Act by way a Motion by an advocate as an Interested Party will only escalate costs contrary to the stated objective of the Election Disputes Resolution.

**Merits of the Fees Agreement**

18. The merits of the purported fee agreement the subject of the application before the Court is a matter for determination by the Court when the application comes up for hearing.

The question whether the advocate’s lien over the client’s property has crystallized is the proper subject for determination at the full hearing of the application on the merits. The decision of **Ogolla, J. in Graham Alder & 3 ors v. Stephen Musalia Mwenesi t/a S. Musalia Mwenesi Advocates** (2015) eKLR that “as there was no taxation there is no amount due capable of attracting lien to the client’s files or property” is respectfully noted.

19. I have also noted the decision of late Onguto, J. (God bless his soul) in **Booth Extrusions (formerly Booth – Manufacturing Africa Ltd v. Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates** (2014) eKLR on waiver or abandonment of lien by an advocate.

However, as said before, the validity of a lien in this matter is an issue for merit determination upon hearing.

**Orders**

20. Accordingly, for the reasons, set out above, the 3<sup>rd</sup> Respondent’s Preliminary Objection to the Interested Party’s application dated 28/11/2018 is declined.

21. Costs in the Cause.

*Order accordingly.*

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF FEBRUARY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Simiyu for Mr. Kanjama for 3<sup>rd</sup> Respondent and 1<sup>st</sup> Interested Party

Mr. Odhiambo for 3<sup>rd</sup> Respondent

Mr. Okiro for Mr. Ogolla for the Petitioner.