

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL CASE NO E010 OF 2024 (OS)**

**BLUESAND HOLDINGS  
LIMITED.....APPLICANT**

**VERSUS**

**CHRISTOPHER MITEI t/a  
ARAP MITEI & CO  
ADVOCATES.....RESPONDENT**

**Coram: Before Justice R. Nyakundi**  
**M/s Rapando & Odunga Advocates**  
**M/s Mukabane & Kagunza Advocates**

**JUDGMENT**

**Background**

**1.** The brief background of this Civil Suit is that the Applicant approached this court vide Originating Summons dated 12<sup>th</sup> August, 2024 expressed to be brought under the provisions of Art. 47 and 159(2) and (d) of the Constitution, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 52 Rule 4 and 10 of the Civil Procedure Rules. The Applicant sought the following orders to wit: -

- a. A declaration be and is hereby issued that the Respondent who is an Advocate of the High Court of Kenya has illegally, fraudulently and in breach of his contractual and fiduciary duties to the Applicant withheld Kshs. 2,000,000/= sent to him by the Applicant on 28<sup>th</sup> August, 2018 for onward transmission to Simon Kipsogei Changwony, the vendor of PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80.*
- b. A declaration be and is hereby issued that the Respondent who is an Advocate of the High Court of Kenya has illegally, fraudulently and in breach of his contractual and fiduciary duties to the Applicant withheld a total of Kshs. 7,000,000/= that had been sent to him on 4<sup>th</sup> December, 2018 by Simon Kipkosgei Changwony, the vendor of*

*PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80, as a refund of the deposit of the purchase price for onward transmission to the Applicant.*

- c. An order be and is hereby issued compelling the Respondent - Advocate to deliver the cash account of Kshs. 9,000,000/= that he illegally, unlawfully and fraudulently withheld in breach of his contractual and fiduciary duties to the Applicant*
- d. An order be and is hereby issued compelling the Respondent-Advocate to pay to the Applicant immediately on the delivery of the judgment herein the total amount of Kshs. 9,000,000/= that he illegally, unlawfully and fraudulently withheld, plus interest at court rates from 16<sup>th</sup> March, 2019 when demand and notice of intention to sue was issued until payment in full.*
- e. The costs of this suit be borne by the Respondent-Advocate.*

**2.** The summons was predicated upon grounds that:

- a. The applicant instructed the Respondent-Advocate to represent it in the purchase of the parcel of land known as PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80 (“the parcel of land”).
- b. Consequently, the Respondent-Advocate prepared the agreement for sale dated 8<sup>th</sup> February, 2018 between the applicant and Mr. Simon Kipkosgei Changwony (“the vendor”).
- c. The agreement for sale envisaged that the total consideration would be Kshs. 42 million, with the deposit of the purchase price of Kshs. 10 million being paid by the applicant to the vendor through the Respondent’s bank account.
- d. On 8<sup>th</sup> February, 2018, the applicant requested Shawasha Company Limited to remit the sum of Kshs. 10 million to the Respondent for onward transmission to the vendor, which request was duly accepted by Shawasha Company Limited on 9<sup>th</sup> February, 2018.
- e. On 14<sup>th</sup> February, 2018, Shawasha Company Limited as requested by the applicant remitted the sum of Kshs. 10 million to the

- Respondent through his bank account no. 0051320001 domiciled at Diamond Trust Bank Limited for onward transmission to the vendor.
- f. On 28<sup>th</sup> August, 2018 the applicant further remitted Kshs. 2 million to the Respondent for onward transmission to the vendor as per the sale agreement.
  - g. On 23<sup>rd</sup> October, 2018 the applicant received a letter dated 22<sup>nd</sup> October, 2018 authored by the vendor's advocates communicating that the Respondent had only paid to him Kshs. 10 million.
  - h. The actions of the Respondent in illegally, unlawfully and fraudulently withholding Kshs. 2 Million and remitting only Kshs. 10 million are a breach of both his contractual and fiduciary duties as an advocate.
  - i. Vide a letter dated 8<sup>th</sup> December, 2018 sent to the Respondent and copied to the applicant, the vendor in the sale agreement communicated his decision to rescind the agreement for the sale of the parcel of land.
  - j. The letter of 8<sup>th</sup> December, 2018 further stated that the vendor had refunded the applicant Kshs. 9 million through the Respondent, and retained the sum of Kshs. 1 million as liquidated damages for breach of contract.
  - k. In further breach of his duties as an advocate, out of the entire Kshs. 9 million that was refunded to the Respondent by the vendor on 4<sup>th</sup> December, 2018, the Respondent only remitted the sum of Kshs. 2 million to the applicant, leaving a balance of Kshs. 7 million that he continues to hold to date.
  - l. The total amount the Respondent illegally, unlawfully and fraudulently withheld is therefore Kshs. 9,000,000/=.
  - m. Vide its demand letters dated 16<sup>th</sup> March, 2019 and 8<sup>th</sup> April, 2019, the applicant requested the Respondent to release the 9 million to it, but these letters did not elicit any response.

- n. The Respondent has to date refused, failed, and neglected to release to the applicant Kshs. 9,000,000 he illegally and fraudulently withheld.
- o. As a result, the applicant has suffered immeasurable damage and significant financial strain that has nearly forced it into liquidation.
- p. Unless the orders sought are granted, the applicant will suffer irreparable harm as it will not only lose the Kshs. 9,000,000/= the Respondent illegally and unlawfully withheld, but also be subjected to further financial difficulties and distress that are forcing it into liquidation.

### **Response to the Originating Summons**

- 3.** In response to the summons, the Respondent swore a replying affidavit dated 22<sup>nd</sup> October 2024 in which he deposed as hereunder:
- a. That the applicant did not pay to his law firm Kshs. 10 million pursuant to the transaction relating to the sale agreement dated 8<sup>th</sup> February, 2018.
  - b. That the applicant cannot seek to recover money that it did not personally pay to his law firm.
  - c. That money paid by an entity other than the applicant which is a body corporate under the Companies Act, cannot be recovered by the applicant.
  - d. That the applicant is a separate juridical entity enjoying separate legal personality from Shawasha Company limited and cannot implead on its behalf.
  - e. That Shawasha Company Ltd was not privy to the sale agreement dated 8<sup>th</sup> February, 2018 and it could not make any payments that would be recovered by the applicant from the Respondent.
  - f. That the applicant did not assign or carry out notation of its rights and interests under the sale agreement dated the 8<sup>th</sup> February, 2018 to constitute Shawasha Company Ltd into a party that could make payments on its behalf and proceed to recover.

- g. That the resolution by Shawasha Company Limited is inchoate and void it has no company seal affixed to it.
  - h. That the resolution by Shawasha Company Limited was ineffective and inchoate for purposes of evidence and enforcement as it was not lodged for registration with the Registrar as required by section 27(1) of the Companies Act Cap. 486 within 14 days.
  - i. That the special ordinary resolution by the applicant of the meeting of 9<sup>th</sup> August, 2024 retaining Rapando & Odunga Advocates giving authority to Barmazze Chepngetich to sign documents and prosecute this matter is inchoate and void as it has no seal of the corporation duly affixed.
  - j. That the special ordinary resolution by the applicant of the meeting of 9<sup>th</sup> August, 2024 is void and inchoate for want of being lodged for registration with the Registrar within 14 days of its passing as required by section 27(1) and (2) of the Companies Act.
  - k. That in the absence of the registered resolution the originating summons and the accompanying documents are a nullity as they have been brought by a person who is not duly authorized and ought to be struck out with costs.
  - l. That the written authority under Order 4 Rule 1(4) of the Civil Procedure Rules, 2022 is predicated on an unregistered resolution thus a nullity and the originating summons ought to be struck out with costs.
  - m. That the applicant did not pay legal fees for the retainer to his firm.
  - n. That his legal fees for the transaction considering the consideration for the transaction was Kshs. 42,000,000/= is computed.
  - o. That the applicant also unsuccessfully impleaded him vide Eldoret Chief Magistrate Court Civil Suit No. 1028 of 2019 over the matter herein and the action was struck out with costs to him and he claims as against it a sum of Kshs. 659,228 as party and party costs.
- 4.** Vide a ruling dated 28<sup>th</sup> January 2025, this Honourable Court ordered that the Originating Summons be subjected to a full substantive hearing to

give specific considerations on the scope of the commercial dispute. Thereafter, this matter proceeded for a full hearing on 8<sup>th</sup> August 2025.

### **Applicant's Case Summary**

**5.** The Applicant produced two (2) witnesses in support of its case. PW1 Barmasse Eva Chepngetich who is an officer of the Applicant's Company adopted the contents of her affidavit sworn on 12<sup>th</sup> August 2024 and produced the annexures thereto as her evidence in chief. In particular, PW1's testimony was as follows: -

- a)** That the Respondent-Advocate has not disputed that he received Kshs. 10 million from Shawasha Company Limited on 14<sup>th</sup> February, 2018, but claims that the applicant can neither recover the money as it did not personally pay it to him, nor can it purported to implead on behalf of Shawasha Company Limited.
- b)** On 8<sup>th</sup> February, 2018, the Respondent-Advocate on the applicant's instructions prepared the agreement for sale dated 8<sup>th</sup> February, 2018 for the sale of the parcel of land known as PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80 between the applicant and Mr. Simon Kipkosgei Changwony ("the vendor").
- c)** That the agreement for sale envisaged that the total consideration would be Kshs. 42 million, with the deposit of the purchase price of Kshs. 10 million being paid by the applicant to the vendor through the Respondent's bank account.
- d)** It is within her knowledge that the applicant requested Shawasha Company Limited to remit the sum of Kshs. 1 million to the Respondent for onward transmission to the vendor.
- e)** That there is evidence on record, in the form of the duly signed and sealed company resolution dated 9<sup>th</sup> February, 2018 that shows that Shawasha Company Limited duly authorized the applicant's request to transfer Kshs. 10,000,000/= to the Respondent-Advocate herein, who would then forward it to the vendor as the deposit for the purchase of the parcel of land.

- f)** That there is evidence on record in the form of the duly authenticated swift transfer evidencing remittance and payment of Kshs. 10,000,000 by Shawasha Company Limited to the Respondent on behalf of the applicant.
  - g)** Further that there is evidence on record in the form of the vendor's letter dated 22<sup>nd</sup> October, 2018 communicating that he had only received 10 million towards the purchase of the suit property, and a further letter dated 6<sup>th</sup> December, 2018 stating that he had rescinded the sale agreement and refunded Kshs. 9,000,000/= through the Respondent-Advocate who was representing the applicant in the transaction.
  - h)** On the issue of the Originating summons being a nullity since the applicant did not have a special resolution, she deposed that she has in her custody the applicant's original special resolution and authorizations dated 9<sup>th</sup> August, 2024 that are duly signed and sealed.
  - i)** As to the costs of defending the suit at the trial court, the applicant through the deponent deposed that the Respondent's party and party costs in Eldoret CMCC 1028 o 2022; Bluesand Holdings Limited versus Christopher Arap Mitei t/a Arap Mitei Advocates is not only excessive but has equally not been taxed so as to form a basis for withholding Kshs. 9 million owed to the applicant exclusive of interest.
  - j)** That the said bill is untaxed and therefore cannot be a basis in law and in fact for the Respondent to withhold Kshs. 9 Million that the applicant is entitled to.
- 6.** PW2 Kiprono Mutai Josiah, the director of Shawasha Company Limited adopted his affidavit sworn on 24<sup>th</sup> October 2024 and its annexures as his evidence. In particular, PW2's testimony was as follows: -
- a)** That on 8<sup>th</sup> February 2018, the Applicant requested Shawasha Company Limited to remit kshs. 10,000,000/= to the Respondent

through bank account no. 0051320001 domiciled at Diamond Trust Bank limited for onward Transmission to the vendor.

- b)** He confirmed that on 9<sup>th</sup> February 2018, Shawasha Company Limited duly accepted this request by the Applicant vide a company resolution duly signed and sealed on even date.
- c)** That the said resolution dated 9<sup>th</sup> February 2018 that appears at annexed affidavit sworn by Barmasse Eva Chepngetich on 12<sup>th</sup> August 2024 is not duly signed and sealed but also emanates from Shawasha Company Limited.
- d)** On 14<sup>th</sup> February 2018, Shawasha Company Limited as requested by the Applicant duly remitted kshs. 10,000,000/= to the Respondent through his bank account no. 0051320001 domiciled at Diamond Trust Bank Limited for onward transmission to the vendor.
- e)** The ksh. 10 million paid to the Respondent on 14<sup>th</sup> February 2018 was therefore on behalf of the Applicant and on the strength of the special resolution dated 9<sup>th</sup> February 2018.
- f)** The allegation by the Respondent that the Applicant cannot recover the money transferred to him by Shawasha Company Limited yet the money was paid on its behalf and has never even been refunded to Shawasha Company Limited is not only escapist, but also demonstrative of the illegal and fraudulent scheme by the Respondent to unjustly enrich itself at the Applicant's expense with no regard for the contractual or fiduciary duties he owes it as an Advocate.

**7.** This marked the close of the Applicant's case.

### **Respondent's Case Summary**

**8.** The Respondent herein Christopher Mitei (DW1) testified during the trial on 27<sup>th</sup> October 2025 as the only witness. DW1 relied on the contents of his affidavit sworn on 22<sup>nd</sup> October 2024 and produced the annexures thereto as her evidence in chief. In particular, DW1 did not essentially

deny the historical events of the commercial transactions leading to the present dispute. It was his position that the money was wired to his account from a third party who apparently did so on behalf of the Plaintiff/Applicant. This was in respect of the Plaintiff/Applicant's instructions to the Defendant/Respondent to handle the purchase of the Land Parcel No. *PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80*. The Defendant/Respondent acknowledged as having prepared a sale agreement dated 8<sup>th</sup> February 2018 on behalf of the Applicant and the vendor Simon Kipkosgei Changwony. This agreement necessitated kshs. 10,000,000/= to be paid via his account no. 0051320001 domiciled at Diamond Trust Bank. This transaction was effected on 14<sup>th</sup> February 2018 to that very same account for onward transmission to the vendor on Simon Kipksosgei Changwony.

9. In the same chronology of events, an additional kshs. 2,000,000/= for completeness of the purchase price. It is also not in dispute from the documentary evidence that the total balance of kshs. 12,000,000/= was never remitted to the vendor within the covenants stipulated in the sale agreement. It is further in evidence that the Respondent wired and/or transmitted part of the sale price totaling to kshs. 10,000,000/= and withheld the balance of kshs. 2,000,000/= necessitating the vendor to rescind the sale agreement on 6<sup>th</sup> December 2018. From the evidence deducible between the Respondent, the vendor refunded kshs. 9,000,000/= withholding kshs. 1,000,000/= as a penalty for non-performance of the terms of the sale on the part of the Applicant/Plaintiff.
10. This happens to be part of the amount prima facie forming the substantial question in this commercial dispute but apparently in the cause of the pendency of this dispute or at an earlier date, there is cogent evidence that the Respondent remitted kshs. 2,000,000/= to the Applicant withholding the kshs. 7,000,000/=.

## **Applicant's Submissions**

- 11.** The applicant through Learned Counsel Mr. Rapando filed submissions in support of the Originating summons. Counsel gave a brief background of the suit and put the matter to context, out of which the following issues were couched for determination:
- a. Whether there exists an advocate-client relationship between the applicant and the Respondent-Advocate.
  - b. Whether the Respondent-Advocate has in its possession monies or documents belonging to the applicant.
  - c. Whether the Respondent is holding the applicant's money without its consent.
  - d. There is no justification for the holding of the applicant's monies by the Respondent,
- 12.** Learned counsel submitted that for one to be successful in a claim for the delivery and payment of cash commenced through an originating summons under Order 52 Rule 4(1) of the Civil Procedure Rules, he/she must demonstrate the aforementioned elements which have been couched as issues for determination.
- 13.** Starting with the first issues, learned counsel argued that that the advocate-client relationship has been demonstrated and cited the case of **Samson Owino Ger Marmanet Forest Co-operative & Credit Society Limited (1988) eKLR**. He also relied on the case of **Uhuru Highways Development Ltd and Other versus Central Bank of Kenya and other (2) (2002) 2 EA654 (CAK)** where the court reasoned that an advocate-client relationship can be discerned from a careful consideration of the correspondence on record and in particular a fee-note and notice of taxation. It is on this strength that counsel submitted that there is evidence on record, to wit, the sale agreement dated 8<sup>th</sup> February, 2018, that is drawn by the Respondent. That there is further evidence on record, to wit, the draft advocate-client bill of costs annexed to the Respondent's replying affidavit that confirms that the applicant duly instructed the Respondent-advocate to represent it in the transaction.

- 14.** On the second element, Mr. Rapando submitted that the Respondent has in his possession monies belonging to the applicant as a former client, and has therefore satisfied the second limb to warrant the grant of the orders sought.
- 15.** Learned Counsel submitted that the Respondent has not disputed that he was instructed by the applicant; that he did receive money from the applicant through Shawasha Company Limited; that upon termination of the sale agreement on 6<sup>th</sup> December, 2024 the Respondent received through his bank account the refund of Kshs. 9,000,000/= from the vendor vide a swift transfer dated 4<sup>th</sup> December, 2018.
- 16.** It is on that basis that the applicant through counsel submitted that the refund of Kshs. 9 million received by the Respondent on 4<sup>th</sup> December, 2018 and the Kshs. 2 million it failed to remit to vendor on 28<sup>th</sup> August, 2018 constitute client's money as defined under the Advocates (Accounts) Rules. This is because they are monies that were received by the Respondent-Advocate account of the applicant for whom he was representing in the purchase of the property. That therefore, the applicant has satisfied the second limb for the grant of orders that seek for the recovery of these monies.
- 17.** On the question as to whether the Respondent is holding the applicant's monies illegally, unlawfully, and fraudulently, learned counsel submitted that the Respondent has illegally, fraudulently and in breach of his contractual and fiduciary duties as an advocate withheld a total of Kshs. 9 million that belongs to the applicant. The applicant further urges that given this illegal withholding, it has satisfied the third limb for the grant of the orders that seek for the recovery of these monies. In support of his submission on this limb, counsel cited the case of National Bank of Kenya Limited V E. Muriu Kamau & Another (2009) eKLR and the case of Otieno Ragot & Co. Advocates v Kenindia Assurance Co. Ltd (2017) eKLR.
- 18.** Learned Counsel further submitted that the evidence on record notably shows that instead of releasing the entire Kshs. 9 million, the

Respondent only remitted Kshs. 2 million to the applicant in a classic demonstration of a modern day impunity. That evidence in record further shows that the Respondent continues to withhold the sum of Kshs. 7 Million to date in breach of his contractual obligations, despite the applicant issuing demands and even instituting court proceedings.

- 19.** On the final issue, learned counsel submitted that there is no justifiable basis for the Respondent's continued illegal, unlawful, and fraudulent withholding of the applicant's monies. That the Respondent calimed that it is only shawasha company and not the applicant who can recover Kshs. 10 million. According to the Respondent, Shawasha Company Limited was not privy to the agreement dated 8<sup>th</sup> February, 2018 and it could therefore not make payments that could be recovered by the applicant from the respondent.
- 20.** Mr. Rapando learned counsel argued that such an argument is without legal and factual basis as there is clear evidence on record in form of the resolution dated 9<sup>th</sup> February, 2018 by Shawasha Company Limited authorizing the payment of the 10 million to the Respondent through its bank account on behalf of the applicant.
- 21.** Learned counsel cited the case of **William Muthee Muthami v. Bank of Baroda (2014) eKLR** where the court of Appeal held that a person can enforce a benefit done on its behalf by another, which constitutes an exception to the doctrine of privity of contract.
- 22.** In sum, Counsel submitted that the facts of this case show that the Respondent continues to withhold the sum of Kshs. 9 million due to the applicant without any justification. That the conduct of the Respondent not only amounts to breach of contract, but is also unjustified, disgraceful, dishonorable and incompatible with the status of the Respondent.

### **Applicant's further submissions**

- 23.** I also take note that on 2<sup>nd</sup> November 2025, the Applicant filed further written submissions in support of the Originating Summons dated 12<sup>th</sup>

August 2024 and further to the Written Submissions and digest of Authorities dated 18<sup>th</sup> November 2024.

- 24.** The learned counsel for the Applicant, Mr. Rapando, submitted that the application was properly anchored in law and relied on the Court of Appeal decision in ***Samson Owino Ger Vs Marmanet Forest Co-operative & Credit Society Ltd***, which sets out the requirements for recovery of monies illegally held by an advocate, namely: the existence of an advocate-client relationship; possession by the advocate of monies belonging to the client; lack of the client's consent; and absence of any lawful justification for retaining the monies. Mr. Rapando submitted that in the present matter, the existence of an advocate-client relationship was not disputed, as it was clearly evidenced by the sale agreement drawn by the Respondent naming himself as advocate for both parties, the correspondence on record, and the Respondent's own draft bill of costs.
- 25.** The Learned Counsel submitted that the real issue for determination was whether the Respondent was in possession of Kshs. 9,000,000 belonging to the Applicant without consent and whether there existed any lawful justification for retaining the said sum. He submitted that although the Respondent denied holding the Applicant's funds and claimed that the monies originated from Shawasha Company Limited, the Respondent's own admissions under cross-examination told a different story. The Respondent admitted that he received Kshs. 12,000,000 for onward transmission to the vendor but remitted only Kshs. 10,000,000; that he subsequently received a refund of Kshs. 9,000,000 from the vendor on 4<sup>th</sup> December 2018 for onward transmission to the Applicant; that he remitted only Kshs. 2,000,000 to the Applicant and retained a balance of Kshs. 7,000,000 to date; and that despite receiving demand letters dated 16th March 2019 and 8th April 2019, he failed to release the monies. He submitted that these admissions, taken together with the resolution and testimony of Shawasha Company Limited confirming that the payments were made

for and on behalf of the Applicant, clearly established that the Respondent was holding the Applicant's monies without consent. He further submitted that the doctrine of privity of contract could not shield the Respondent from accounting, especially in light of the Respondent's own admission that the funds were received under the Applicant's land purchase transaction.

26. On the issue of justification, Mr. Rapando submitted that the Respondent's claim to retain the monies by way of an advocate's lien for alleged unpaid legal fees amounting to Kshs. 1,543,528.35 was legally untenable. He relied on ***John Karungai Nyamu & another v Muu & Associates Advocates [2008] eKLR***, where Lesiit J. held that an advocate has no right to exercise a lien over monies received strictly for onward transmission to a client. This position was reaffirmed in ***Simon Njumwa Maghanga v Joyce Jeptarus Kagongo t/a Chesaro & Co. Advocates [2014] eKLR***, where the Court emphasized that an advocate's fees only become due upon taxation of a bill of costs and that it is improper for an advocate to withhold a client's money on the basis of an untaxed bill. He also added that in the instant case, there was neither a fee agreement nor a taxed bill of costs, and that the Respondent admitted he was relying on a draft and undated advocate-client bill of costs and an untaxed party-and-party bill.
27. The Learned Counsel further relied on the decision of Odunga J. in ***Republic v Lucas M. Maitha, Chairman, Betting Control and Licensing Board & 4 others ex parte Interactive Gaming and Lotteries Limited [2010] eKLR*** to submit that an advocate cannot exercise a lien over property or funds held unlawfully, since a lien presupposes lawful possession. He also cited the same authority to argue that a lien is merely security for fees and must be commensurate with the amount claimed, and cannot extend to the entire property or sum where the alleged fees constitute only a fraction thereof.

- 28.** In conclusion, Mr. Rapando, the learned Counsel submitted that the Respondent's continued retention of the Kshs. 9,000,000 for nearly six years was unlawful, unjustified, and professionally reprehensible. He relied on ***Gabriel Mugai Njiri v Wanga Robert Hawi t/a R. H. Wanga & Co. Advocates [2018] eKLR***, where the Court held that such conduct amounts to a breach of contract and is unjustified, disgraceful, dishonorable and incompatible with the status of an advocate.
- 29.** In conclusion, Counsel urged the Court to find that the Applicant had established a proper case for the grant of the orders sought in the originating summons dated 12<sup>th</sup> August 2024 and to award the Applicant the costs of the suit, the proceedings having been necessitated solely by the Respondent's breach of contract and professional misconduct.

### **Respondent's written submissions**

- 30.** On the part of the Respondent, Learned Counsel Mr. Kagunza argued in opposition to the summons and submitted only one limb; proof of the claim.
- 31.** Learned counsel started by submitting that the applicant had the onus of proof based on sections 107 and 108 of the Evidence Act. That the applicant was bound to establish that it actually gave the respondent kshs. 10,000,000/=. Counsel submitted that in this case, the applicant is a body corporate and it could transact and pay in its own name. The Relationship of an advocate and a client only existed as between the applicant and the Respondent. That in this case as presented by the applicant, it gives evidence of the payment having been made by Shawasha Company Limited to the Respondent which is a different person from the applicant.
- 32.** Learned Counsel cited the provisions of Order 52 Rule 4 of the Civil Procedure Rules and submitted that the said Shawasha Company Limited is not a legal representative of the applicant. It was also not

enjoined as a co-applicant to constitute it as a client of the Respondent. Counsel submitted that as things stand the applicant has not proved that it gave the Respondent the said sum of money. He urged this court to be guided by the case of ***KM (Minor suing through his mother next friend) RAN v Lydia Nthenya & Another (2017) eKLR.***

- 33.** It is submitted for the Respondent that no efforts were made by the applicant to demonstrate that privity of contract existed as between Shawasha Company Limited in respect of the land purchase agreement to constitute it as a person liable to pay the purchase price on behalf of the applicant. He invited this court to be guided on this by the case of ***Agricultural Finance Co-operation v Lengetia Ltd (1985) KLR 765.***
- 34.** Further that no evidence of assignment of any rights to the said Shawasha Company Limited was led to constitute as a person who could pay the purchase consideration. Further, the said Shawasha Company Limited who it is claimed paid the said money to the Respondent, it is the only one which could implead him. Counsel submitted that the resolution by Shawasha company limited is void and inchoate for want of a company seal. The resolution was not registered with the Registrar of Companies as require by section 27(1) of the Companies Act within 14 days of its making. The same fate befalls the special ordinary resolution of the 9<sup>th</sup> August, 2024 by the applicant.
- 35.** Counsel further submitted that on the gravity attached to the matter, under sub - sections 4 and 5 of section 27 of the Companies Act therein criminal consequences of a fine of up to Kshs. 200,000/= and a default fine are provided for. He submitted on behalf of the Respondent that in the absence of the registered resolutions the originating summons and accompanying documents are a nullity and ought to be struck out with costs. The written authority under Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 is predicated on unregistered

resolutions which render the action a nullity. The onus to tender the registered resolution was upon the applicant being a fact within its knowledge by dint of section 112 of the Evidence Act.

- 36.** The Respondent further submitted that the applicant did not pay legal fees and which is not denied by the applicant. The Respondent has annexed his bill of costs of Kshs. 884,330/=. Counsel argued that the applicant also failed to pay party to party costs after unsuccessfully impleading him in the Magistrate court in the sum of kshs. 659,228/=. The Respondent submitted that a lien exists for any such money if there was proof it was paid to him by the applicant.
- 37.** On the claim of interest, learned counsel submitted that if the applicant had proved that the respondent had received money from it and which has not been proved, the same would not be decreed as rule 2 of the Advocates (Deposit Interest) Rules made under section 83 of the Advocates Act stipulates that except as provided by the Rules, an Advocate is not liable by virtue of the relation between the advocate and the client to account to any client for interest received by the advocate on moneys deposited in a client account being monies received or held for or on account of his clients generally. On this counsel cited the decision in **Meenye & Kirima Advocates Vs MM (Suing on behalf of MFM, a minor) & Another (2020)**.

### **Analysis and Determination**

- 38.** I have read and considered the pleadings, affidavits and submissions filed on record. There are four (4) issues for determination by this Honourable Court: -
- a. Whether an Advocate-Client relationship existed between the Applicant and the Respondent.*
  - b. Whether the Respondent is in possession of monies belonging to the Applicant.*

- c. *Whether the Respondent's continued retention of the monies is unlawful, illegal and fraudulent in breach of his fiduciary and contractual duties.*
- d. *Whether the Respondent is entitled to retain the monies under an advocate's lien or otherwise.*

**Whether an Advocate-Client relationship existed between the Applicant and the Respondent.**

**39.**The nature of advocate-client relationship is multifaceted. It may be categorized into three: as contractual, as fiduciary and as an agency relationship. For the purposes of this civil suit, I will discuss two (2) of those relationships as stated hereunder.

- a) **Contractual Relationship-** This is where an advocate agrees to offer legal services to the client through a contract. The contract may either be express or implied depending on the circumstances. However, at some point the contract between the advocate and the client should be made explicit and must be signed by the client to show the terms as agreed between them. This contract is regulated by the ordinary principles of contract law save that it factors in the fiduciary nature of the advocate-client relationship. In this regard, it is expected that the agreement as to the fees to charge should be reasonable based on the circumstances of the case and should be written and signed.
  
- b) **Fiduciary Relationship-** The advocate-client relationship is fiduciary in nature because of the trust the client has in the advocate. The rules of professional conduct and ethics, therefore, prescribe how an advocate should behave under such circumstances. For instance, there are rules on disclosure which prohibit an advocate from disclosing certain communications which are regarded privileged. Again, there are rules which regulate how an advocate is supposed to handle the client money and other properties to the best interest of

the client. Rules on conflict of interest prohibit an advocate from engaging in conduct that are likely to create conflict of interest or conduct which is likely to embarrass the process of court and defeat the course of justice. The overriding requirement is that an advocate should always have the client in mind.

**40.** In the persuasive case of **Samson Owino Ger Vs Marmanet Forest Co -operative & Credit Society Ltd (1988) eKLR**, the Court of Appeal held as follows: -

*For the definition of the term “client” one has to turn to section 2 of the Advocates Act (cap 16) where it is stated that “client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, an advocate and any person who is or may be liable to pay to an advocate any costs. Moreover, paragraph 11 of the same case provided as follows, “When a person says that he has instructed an advocate to act for him all he means, and is understood by the officious bystander to mean, is that he has retained the professional services of an advocate in relation to a particular transaction or business and he has in consequence become that particular advocate’s client.”*

**41.** From the evidence on record, there is no serious dispute that an advocate-client relationship existed between the Applicant and the Respondent. This is clear from the record because in January 2018, the Applicant instructed the Respondent/Advocate to represent it in the transaction for the purchase of property known as PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80 and that the sale agreement dated 8<sup>th</sup> February 2018 filed on record was drawn by the Respondent/Advocate and the Respondent in his testimony neither denied preparing this sale agreement nor did he dispute the provisions of clauses 1.1.7 and 1.1.8 therein that provide that he would act for both the Applicant and the Vendor. Furthermore, there is evidence on record showing that the

advocate-bill of costs annexed to the Respondent's replying affidavit confirms that the Applicant duly instructed the Respondent-Advocate to represent it in the transaction for the purchase of land and the Respondent was then claiming fees for the preparation of the said sale agreement.

**42.** I take note that in the case of **Uhuru Highways Development Ltd Vs Central Bank of Kenya [2002] 2 EA 654**, the Court affirmed that an advocate-client relationship need not be formalized by a written retainer. In particular, the Court of Appeal held as follows: -

*Whether the plaintiffs were the counsel's clients may be discerned from a careful consideration of the correspondence on the record. A careful consideration of the same is, of course, required. We refer to the fee note and notice of taxation and conclude that the relationship emanating from these exchanges is that of an advocate and client or else the counsel should have sent these notes through D V Kapila & Company, Advocates, alleged by the counsel as acting for the plaintiffs. For the sake of clarity, we reproduce herewith the fee note dated 23rd October, 1993.*

**43.** Based on the discussed legal principles and the facts in the court record, it is my finding that there existed an Advocate-Client relationship between the Applicant and the Respondent-Advocate.

### **Whether the Respondent is in possession of monies belonging to the Applicant.**

**44.** I take note that the Applicant has invoked Order 52 Rule 4(1) of the Civil Procedure Rules to recover the amount of money illegally held by the Respondent. This provision of the Civil Procedure Rules expressly provides as follows: -

**4. Power to order advocate to deliver accounts and documents [Order 52, rule 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) the delivery by the advocate of a cash account;*

*(b) the payment or delivery up by the advocate of money or securities;*

*(c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;*

*(d) the payment into or lodging in court of any such money or securities;*

*(e) the delivery up of papers and documents to which the client is entitled.*

- 45.** Client's money is defined under the Advocates (Accounts) Rules as money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connection with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity. In the case of **Samson Owino Ger Vs Marmanet Forest Co -operative & Credit Society Ltd (Supra)**, the Court of Appeal stated as follows with regards to Order 52 rule 4(1) of the Civil Procedure Rules: -

*Order 52 rule 4(1) gives the court power to order an advocate to deliver a cash account. It is a most useful summary procedure which circumvents the inevitable delay inherent in recovery by ordinary process of a plaint. It provides:*

***“52(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) the delivery by the advocate of a cash account.”***

- 46.** In the case of **Malindi Holdings & Estate Agents Limited Vs Morris Mwambui Kupalia [2011] KECA 363 (KLR)**, the Court of

Appeal held as follows with regards to Order 52, rule 4 of the Civil Procedure Rules: -

*“In our view, the intendment of the rule was to secure quick resolutions to disputes between advocates and their clients without undue regard to technicalities. It is a noble procedure which has since been augmented by the enactment of sections 1A and 1B of the Civil Procedure Act and the corresponding sections 3A and 3B of the Appellate Jurisdiction Act, as well as the provisions of Article 159 (2) | (b) and (d) of the new Constitution. On that ground alone, which is conceded, this appeal ought to succeed.”*

**47.** Before I distill this issue, the Respondent- Advocate in his Replying Affidavit had deponed that the applicant cannot seek to recover money that it did not personally pay to his law firm, that money paid by an entity other than the applicant which is a body corporate under the Companies Act, cannot be recovered by the applicant, that the applicant is a separate juridical entity enjoying separate legal personality from Shawasha Company limited and cannot implead on its behalf. He also deponed that Shawasha Company Ltd was not privy to the sale agreement dated 8<sup>th</sup> February, 2018 and it could not make any payments that would be recovered by the applicant from the Respondent, that the applicant did not assign or carry out notation of its rights and interests under the sale agreement dated the 8<sup>th</sup> February, 2018 to constitute Shawasha Company Ltd into a party that could make payments on its behalf and proceed to recover and that the resolution by Shawasha Company Limited is inchoate and void it has no company seal affixed to it.

**48.** The Respondent further deponed that the resolution by Shawasha Company Limited was ineffective and inchoate for purposes of evidence and enforcement as it was not lodged for registration with the Registrar as required by section 27(1) of the Companies Act Cap. 486 within 14 days, that the special ordinary resolution by the applicant of the meeting of 9<sup>th</sup> August, 2024 retaining Rapando & Odunga Advocates giving authority to Barmazze Chepngetich to sign documents and prosecute this matter is

inchoate and void as it has no seal of the corporation duly affixed, that the special ordinary resolution by the applicant of the meeting of 9<sup>th</sup> August, 2024 is void and inchoate for want of being lodged for registration with the Registrar within 14 days of its passing as required by section 27(1) and (2) of the Companies Act and that in the absence of the registered resolution the originating summons and the accompanying documents are a nullity as they have been brought by a person who is not duly authorized and ought to be struck out with costs. The Respondent furthermore deponed that the written authority under Order 4 Rule 1(4) of the Civil Procedure Rules, 2022 is predicated on an unregistered resolution thus a nullity and the originating summons ought to be struck out with costs.

**49.** On the other hand, PW2 Kiprono Mutai Josiah, the director of Shawasha Company Limited deponed that on 8<sup>th</sup> February 2018, the Applicant requested Shawasha Company Limited to remit kshs. 10,000,000/= to the Respondent through bank account no. 0051320001 domiciled at Diamond Trust Bank limited for onward Transmission to the vendor. He confirmed that on 9<sup>th</sup> February 2018, Shawasha Company Limited duly accepted this request by the Applicant vide a company resolution duly signed and sealed on even date. He also deponed that the said resolution dated 9<sup>th</sup> February 2018 that appears at annexed affidavit sworn by Barmasse Eva Chepngetich on 12<sup>th</sup> August 2024 is not duly signed and sealed but also emanates from Shawasha Company Limited, that on 14<sup>th</sup> February 2018, Shawasha Company Limited as requested by the Applicant duly remitted kshs. 10,000,000/= to the Respondent through his bank account no. 0051320001 domiciled at Diamond Trust Bank Limited for onward transmission to the vendor.

**50.** PW2 further deponed that the kshs. 10 million paid to the Respondent on 14<sup>th</sup> February 2018 was therefore on behalf of the Applicant and on the strength of the special resolution dated 9<sup>th</sup> February 2018 and that The allegation by the Respondent that the Applicant cannot recover the money transferred to him by Shawasha Company Limited yet the money

was paid on its behalf and has never even been refunded to Shawasha Company Limited is not only escapist, but also demonstrative of the illegal and fraudulent scheme by the Respondent to unjustly enrich itself at the Applicant's expense with no regard for the contractual or fiduciary duties he owes it as an Advocate.

**51.** This Court notes that the Respondent's reliance on section 27 of the Companies Act to impugn the validity of the resolutions and, by extension, the Applicant's standing, is wholly misconceived and legally untenable. Section 27 of the Companies Act merely regulates the filing of certain resolutions for record-keeping and public notice purposes and does not invalidate a resolution as between the company and third parties for failure to lodge it with the Registrar. The section does not provide that an unregistered resolution is void, inchoate, or incapable of conferring authority nor does it extinguish acts done pursuant to such a resolution. In any event, the evidence of PW2, which remained unshaken on cross-examination, clearly establishes that Shawasha Company Limited voluntarily and knowingly remitted Kshs. 10,000,000/= to the Respondent on behalf of and for the benefit of the Applicant and the Respondent accepted and dealt with the funds. Having received the monies in that capacity, the Respondent cannot now approbate and reprobate by invoking technical objections under section 27 of the Companies Act to deny accountability, particularly where the funds have neither been refunded to Shawasha Company Limited nor disbursed in accordance with the purpose for which they were received. To uphold the Respondent's argument would be to elevate procedural technicalities over substantive justice, contrary to Article 159(2)(d) of the Constitution and to sanction unjust enrichment under the guise of corporate formalism.

**52.** I take note that during the hearing of this case, there were substantial issues which arose. In particular, DW1 did not essentially deny the historical events of the commercial transactions leading to the present dispute. It was his position that the money was wired to his account from a third party who apparently did so on behalf of the Plaintiff/Applicant. This was

in respect of the Plaintiff/Applicant's instructions to the Defendant/Respondent to handle the purchase of the Land Parcel No. *PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80*. The Defendant/Respondent acknowledged as having prepared a sale agreement dated 8<sup>th</sup> February 2018 on behalf of the Applicant and the vendor Simon Kipkosgei Changwony. This agreement necessitated kshs. 10,000,000/= to be paid via his account no. 0051320001 domiciled at Diamond Trust Bank. This transaction was effected on 14<sup>th</sup> February 2018 to that very same account for onward transmission to the vendor on Simon Kipksosgei Changwony.

**53.** In the same chronology of events, an additional kshs. 2,000,000/= for completeness of the purchase price. It is also not in dispute from the documentary evidence that the total balance of kshs. 12,000,000/= was never remitted to the vendor within the covenants stipulated in the sale agreement. It is further in evidence that the Respondent wired and/or transmitted part of the sale price totaling to kshs. 10,000,000/= and withheld the balance of kshs. 2,000,000/= necessitating the vendor to rescind the sale agreement on 6<sup>th</sup> December 2018. From the evidence deducible between the Respondent, the vendor refunded kshs. 9,000,000/= withholding kshs. 1,000,000/= as a penalty for non-performance of the terms of the sale on the part of the Applicant/Plaintiff.

**54.** This happens to be part of the amount prima facie forming the substantial question in this commercial dispute but apparently in the cause of the pendency of this dispute or at an earlier date, there is cogent evidence that the Respondent remitted kshs. 2,000,000/= to the Applicant withholding the kshs. 7,000,000/=. Based on this analysis, it is my finding that indeed the Respondent-Advocate is in possession of monies belonging to the Applicant.

**Whether the Respondent's continued retention of the monies is unlawful, illegal and fraudulent in breach of his fiduciary and contractual duties.**

**55.** The Applicant submitted that the Respondent had illegally, fraudulently and in breach of his contractual and fiduciary duties as an Advocate withheld a total of kshs. 9 million that belongs to the Applicant. An advocate holds client funds in a fiduciary capacity and must deal with such funds strictly in accordance with the client's instructions. In **Kim Jong Kyu Vs Housing Finance Company Ltd & 2 others [2015] eKLR**, the court of appeal, Makhandia, Ouko & M'notl, JJ.A.), had these to say: -

*"In our legal system, the advocate/client relationship has long been recognized as fiduciary relationship in which the client places his or her confidence, faith, reliance and trust in the advocate, whose aid, advice, opinion or protection is sought from time to time. The client gives the advocate significant amount of control over the matter in which the brief relates. With this relationship comes certain duties and responsibilities on the advocate. These duties and responsibilities are provided for in the statute and the rules of conduct as we demonstrate below. The sets of rules that govern the advocates' professional conduct arise out of the duty that they owe to the court, their clients, and fellow advocates."*

**56.** Section 80 of the Advocates Act stresses the advocate's duty to a client and provides as follows: -

***"80. Betrayal of trust***

*Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:"*

**57.** In addition, the Advocates (Accounts) Rules and the Advocates (Deposit Interest) Rules draw the permissible limits of dealings with funds

received on behalf of and for the benefit of a client. The foregoing emphasizes that an advocate must at all times act in the best interest of his client; that where he is required to invest he must do so prudently and avoid obvious risks and; that failure to account for funds held by an advocate on behalf of a client is in fact a criminal offence.

**58.** In the case of **National Bank of Kenya Limited Vs E. Muriu Kamau & Another [2009] KEHC 3684 (KLR)**, the Court held as follows: -

*“The law is that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and tort. Where the advocate is in breach of his contractual duty to his client or where he fails to use proper care towards the fulfillment of the instructions he was given, he is liable in damages in so far as the client suffers the loss.”*

**59.** However, when the obligation becomes impossible of performance not because of lack of skill or care, then the advocate is not liable. What the advocate is required where he has been entrusted with the management of a client’s case is to follow or pursue ordinary and accustomed course in the conduct of that case. To make him liable, it is essential to show that there was either a manifest want of skill or great negligence. What is expected of an advocate is that he would be honest, faithful and diligent in the discharge of his instructions. As they say it would be utterly impossible that you could ever have a class of men who would give a guarantee binding themselves in giving legal advice and conducting suits at law to be always in the right. In essence an advocate is only liable where it has been shown that in his dealings or conduct there is an element of want of reasonable skill or that he has been guilty of gross negligence.

**60.** There can be no doubt that an advocate -client relationship is a contract in which the client hires the advocate to offer professional

services, at a fee. The contractual nature of the relationship is evident in the meaning assigned to the word 'client' under the Advocates Act;

*'Client' includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.'*

**61.** The statute regulates the conduct and discipline of advocates; remuneration of advocates; an advocates fiduciary responsibility to clients; and provides for some aspects of principal -agency nature of the advocate-client relationship. In **RTS Flexible Systems Ltd Vs Molkereel Alois Muller GmbH & Co, KG (UK Production) (2010) UKSC14, [45] (Supra)** the Supreme Court of the United Kingdom stated that: -

*"...The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."*

**62.** From the facts of this case, it has already been settled that there was existence of an Advocate-Client relationship elsewhere in this judgement. A scrutiny of the sale agreement dated 8<sup>th</sup> February 2018 at clause 4.2 and 4.3 indicates that the Respondent/Advocate had a contractual obligation to receive from the Applicant both the deposit and the balance of the purchasing price of the Land Reference No. PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80 and remit them to the vendor. It was clear

from the Respondent/Advocate admission that whereas the Applicant remitted to him the sum of kshs. 12,000,000/= for onward transmission to the vendor in part settlement of the purchase price, he only remitted to the vendor kshs. 10,000,000/=. From the court's record, it is also clear that since the rescission of the sale agreement since 6<sup>th</sup> December 2018, the Respondent/Advocate has not released the said sum of kshs. 2,000,000/=. A further scrutiny of the court's record indicates that when the sale agreement was rescinded, the vendor remitted to the Respondent a sum of kshs. 9,000,000/=. There is cogent evidence that the Respondent remitted kshs. 2,000,000/= to the Applicant withholding the kshs. 7,000,000/=. In the Case of **National Bank of Kenya Ltd Vs Pipleplastic Samkolit (k) Ltd & Another (2002) EA 503**, the Court held as follows, *"A Court of Law cannot re-write a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."*

**63.** Based on the facts and discussed legal principles, it is my considered view that failure by the Respondent to remit the kshs. 2,000,000/= to the vendor under the sale agreement and continued withholding of kshs. 7,000,000/= to date constitutes a material breach of the contract between the Applicant and the Respondent/Advocate as the withholding of the monies is illegal and unlawful contrary to the fiduciary and contractual duties of an Advocate.

**Whether the Respondent is entitled to retain the monies under an advocate's lien or otherwise.**

**64.** The Respondent claimed a lien of kshs. 9,000,000/= for unpaid fees being kshs. 884,300/= for drafting the sale agreement dated 8<sup>th</sup> February 2018 and kshs. 659,228.35/= for defending **Bluesand Holdings Limited Vs Christopher Mitei, Eldoret CMCC E1028 of 2019**. On the other hand, the Applicant submitted that no justification exists by the Respondent to hold onto the kshs. 9,000,000/=. The nature and extent of the Advocates lien were set out by Onguto J in [Booth Extrusions](#)

(Formerly) Booth Manufacturing Africa Limited Vs Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR where he stated as follows: -

“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] 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.

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).*

- 65.** From the above case, the following conditions must be met: (a) that there at the date of demand the referable relationship must be one of advocate and client and (b) the costs in question must have been incurred. 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 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.”*

- 66.** 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.

**67.** This court is being called upon to decide as to whether the Respondent-Advocate should refund the entire amount or not. Order 52 rule 4 (3) of the Civil Procedure Rules states as follows: -

*“(3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate’s lien, if any, as the court deems fit.”*

**68.** I take note that the Respondent submitted that the Applicant did not pay legal fees and annexed his bill of costs of Kshs. 884,330/=. Counsel argued that the applicant also failed to pay party to party costs after unsuccessfully impleading him in the Magistrate court in the sum of kshs. 659,228/=. The Respondent submitted that a lien existed for any such money if there was proof it was paid to him by the applicant. On the claim of interest, learned counsel submitted that if the applicant had proved that the respondent had received money from it and which has not been proved, the same would not be decreed as rule 2 of the Advocates (Deposit Interest) Rules made under section 83 of the Advocates Act stipulates that except as provided by the Rules, an Advocate is not liable by virtue of the relation between the advocate and the client to account to any client for interest received by the advocate on moneys deposited in a client account being monies received or held for or on account of his clients generally.

**69.** On the other hand, learned Counsel for the Applicant Mr. Rapando submitted that that the Respondent's claim to retain the monies by way of an advocate's lien for alleged unpaid legal fees amounting to Kshs. 1,543,528.35 was legally untenable while relying in the case of ***John Karungai Nyamu & another Vs Muu & Associates Advocates [2008] eKLR***. He also added that in the instant case, there was neither a fee agreement nor a taxed bill of costs, and that the Respondent admitted

he was relying on a draft and undated advocate-client bill of costs and an untaxed party-and-party bill.

**70.** From the submissions above, it is evident that the Respondent/Advocate herein is claiming his costs. This court cannot assess his costs as that is the duty of the taxing master who is the Deputy Registrar. Order 52 rule 4 (3) allows the court to make an order for taxation. Moreover, section 47 (1) of the Advocate's Act states as follows:

-  
“(1) The jurisdiction of the court to make orders for the delivery by an advocate of a bill of costs, and for the delivery up of or otherwise in relation to, any deeds, documents or papers in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the court.”

*“(1) The jurisdiction of the court to make orders for the delivery by an advocate of a bill of costs, and for the delivery up of or otherwise in relation to, any deeds, documents or papers in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the court.”*

**71.** In the case of **Peter Furmetz Vs James G. Mouko T/A Mouko & Co. Advocates (2015) eKLR**, the Court held as follows: -

*“The defendant herein alleges that he did some work. It is clear that even if the suit was not filed, instructions were given to the advocate. The question then is whether legal fees is only payable to an advocate who carries on the instructions to the satisfaction of his client or the instructions per se triggers the payment of some amount of money as legal fees for that instruction even if the work is not subsequently done. The current dispute is not one that can be decided summarily at this stage. The plaintiff maintains that the instructions were not carried out all while the defendant contends that some work was done. The court cannot ignore the defendant's contention as doing that would be making an arbitrary decision. There is need for the court to assess the work purportedly done by the defendant. The court can*

*as well evaluate the alleged work done by the defendant and make a finding that no work was done. However, this court cannot at this moment decide that no work was done. As I have already indicated, the taking of instructions entails payment of a certain fee. This means to keep in check clients who hope from one legal office to another giving instructions and quickly withdrawing such instructions after having received a different legal opinion from another counsel.”*

**72.** In order to resolve the dispute, it is prudent to have the costs claimed by the Respondent-Advocate evaluated and assessed by the Deputy Registrar. The taxing officer will hear the submissions of all the parties and make a ruling as to whether any amount is payable to the Respondent-Advocate and if so, how much. Thereafter, the Applicant can decide, depending on the outcome of the taxation, decide to either amend, withdraw or make any other action in relation to this matter.

**73.** I also take note that 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. In the case of **Republic Vs Lucas M. Maitha Chairman, Betting Control & Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited [2015] KEHC 624 (KLR), G.V Odunga J** (as then he was) stated as follows: -

*“Again for the right to a lien to succeed, the advocate must be in possession of the funds. Where the advocate is no longer, lawfully, in possession of the funds or the client’s property, the right to a lien cannot be claimed.”*

**74.** As already stated in issue three (3) above, failure by the Respondent to remit the kshs. 2,000,000/= to the vendor under the sale agreement and continued withholding of kshs. 7,000,000/= to date constitutes a material breach of the contract between the Applicant and the Respondent/Advocate as the withholding of the monies is illegal and unlawful. It is my finding therefore that the Respondent’s continued

retention of the funds after demand rendered his possession unlawful. One cannot found a lien on illegality.

**75.** Having considered the pleadings, affidavits, rival submissions and the applicable law, the Originating Summons dated 12<sup>th</sup> August 2024 is hereby allowed and the following orders shall abide: -

- a) *A declaration be and is hereby issued that the Respondent-Advocate unlawfully withheld Kshs. 9,000,000/= belonging to the Applicant being Kshs. 2,000,000/= sent to him by the Applicant on 28<sup>th</sup> August, 2018 for onward transmission to Simon Kipsogei Changwony, the vendor of PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80 and Kshs. 7,000,000/= that had been sent to him on 4<sup>th</sup> December, 2018 by Simon Kipkosgei Changwony, the vendor of PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)/80, as a refund of the deposit of the purchase price for onward transmission to the Applicant.*
- b) *An order be and is hereby issued compelling the Respondent-Advocate to pay to the Applicant the total amount of Kshs. 9,000,000/= that he unlawfully held within thirty (30) days from the date of the judgement herein.*
- c) *An order be and is hereby issued that the Respondent - Advocate shall render a full account of all monies received and disbursed in respect of the transaction.*
- d) *Interest at court rates from 16<sup>th</sup> March, 2019 when demand was made until payment in full.*
- e) *An order be and is hereby issued that if indeed there exists an advocate-client bill of costs and/or a party-and-party bill of costs as alleged by the Respondent-Advocate, the same shall forthwith be filed, placed before and subjected to taxation by the Taxing Master (Deputy Registrar) in accordance with the Advocates Act and the Advocates (Remuneration) Order.*
- f) *There shall be a status conference on **26<sup>th</sup> January 2026** to confirm compliance with the aforesaid orders.*

*g) The costs of this Originating Summons shall be borne by the Respondent/ Advocate.*

*h) Each party be at liberty to apply.*

**76.** Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS AT ELDORET  
THIS 22<sup>ND</sup> DECEMBER 2025**

.....  
**R. NYAKUNDI  
JUDGE**