Adongo (Suing as Legal Representative of the Estate of Thomas Adongo Onuku (Deceased)) v Mwamu t/a Mwamyu & Company Advocates (Miscellaneous Civil Application E032 of 2025) [2025] KEHC 9265 (KLR) (27 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9265 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS CIVIL APPLICATION E032 OF 2025

A MABEYA, J

JUNE 27, 2025

BETWEEN

ALFRED OKEYO ADONGO ..... APPLICANT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THOMAS ADONGO ONUKU (DECEASED)

AND

JAMES AGGREY MWAMU T/A MWAMYU & COMPANY ADVOCATES ..... RESPONDENT

JUDGMENT

1. This is a judgment on the Originating Summons dated 6/3/2025 ("the OS") as well as the Preliminary Objection dated 12/3/2025.

2. In the OS, the applicant prayed that the respondent renders a cash account of all monies due to him arising from the judgment entered in his favour in HCC 110 of 1996 – Thomas Adongo Onuko v Small Enterprises Finance Ltd & another as well as the costs awarded in Civil Appeal 280 of 2008 – Small Enterprises Finances Ltd v Thomas Adongo Onuko T/A Kisumu Expert Tailoring House. That upon rendering such account, the respondent do pay to the applicant the said amounts within 21 days with interest at 14% per annum.

3. The OS was supported by the grounds set out on the face thereof and the supporting affidavit of the applicant and Nokwe Adienge sworn on 6/3/2025, respectively. Further, the applicant's affidavit sworn on 15/4/2025.

4. The applicant's case is that the respondent was the Advocate on record for the deceased herein in the primary suit HCC 110 of 1996 Thomas Adongo Onuko v Small Enterprises Finance Ltd & another

wherein judgment was entered in his favour on the 4/6/2004 in the sum of Kshs 1,080,000/-. The defendants appealed in Civil Appeal 280 of 2008 which was dismissed with costs on the 21/2/2014.

5. That after the appeal was dismissed the decretal amount was released to the respondent who released Kshs 400,000/- to the estate of the deceased leaving a balance of Kshs 780,000/- which the respondent has to-date failed to release together with the costs awarded in both the primary suit and appeal.

6. In response, the respondent filed a preliminary objection dated 12/3/2025 in which he sought to have the applicant's application struck out on the grounds that: -

    a. The application is an abuse of the process of this court as the References Number Kisumu 130, 131 and 133 of 2017 are still pending before the Court for determination and has not been determined.

    b. That application is an abuse of the process of Court and violates Order 52 rule 4 (3) o the *Civil Procedure Rules* which deals with the issue of the lien.

    c. That the application lacks jurisdiction to deal with the matter.

    d. That the applicant herein lacks locus standi to file this application.

7. The respondent also filed a replying affidavit sworn on 10/4/2025. He therein which deposed that he was the applicant's counsel and that following the judgment delivered in the aforesaid matters, he and the applicant agreed that the applicant accepts Kshs 450,000/- as full payment for the work done.

8. That he has so far paid the applicant Kshs 401,000/- and when he attempted to pay the applicant the balance of Kshs 39,000/-, the applicant refused to accept the payment and instead demanded Kshs 780,000/-.

9. That following disagreement between him and the applicant on legal fees, he filed Bills of Costs for a few matters he handled on the latter's behalf being Reference Nos. 130, 131 and 133 of 2017 which were all struck out. Being aggrieved by the decision of the Deputy Registrar, the respondent filed references but reference number 130 was dismissed by Justice Aburili.

10. That there are two Court of Appeal matters pending for taxation in the subject matter namely Kisumu Civil Appeal 301 of 2004 and Kisumu Civil Appeal 280 of 2013.

11. That he has handled a number of matters for the deceased's estate wherein payment of legal fees is pending and in which the applicant has refused, rejected and neglected to pay.

12. In rejoinder the applicant filed a further affidavit sworn on the 15/4/2025 in which he sought to have the respondent's replying affidavit struck for having been filed out of time contrary to the court directions of 25/3/2025.

13. That the respondent had not denied that he was holding monies belonging to the deceased estate which he had refused to release without any justifiable reason. That whereas he was aware of the deceased's death in 2009, the respondent had failed to join the succession proceedings as a creditor.

14. That references 130, 131 and 133 of 2017 all related to and emanated from the primary suit herein and thus formed one transaction for which the respondent vide his letter dated 25/11/2008 agreed to charge the deceased Kshs 116,000/- for both the primary suit and subsequent appeal.

15. That an action for legal fees is based on contract and is thus adversely affected by the Limitation of Action Act thus the respondent cannot purport to charge fees after the expiry of 6 years later as he purports to do now.

16. That References Number Kisumu 130, 131 and 133 of 2017 were dismissed by Aburili J on 12/4/2023 and what is before Court are review applications lodged on the 5/3/2025 after the present application had been filed.

17. That the failure by the respondent to release the funds has exposed the applicant to unquantifiable financial and psychological stress as he has been compelled to access loans to meet financial obligations.

18. The respondent filed a further affidavit sworn on the 6/5/2025 in which he deposed that the 2-year delay in filing the application for review was occasioned by the applicant who misled him that they were negotiating in good faith.

19. That the issue of limitation in this application is bad in law and outside the limitation period as the matter was concluded more than 12 years and as such the applicant's summons ought to be dismissed or in the alternative is premature in light of the existence of Miscellaneous 130, 131 and 133 of 2017 as well as other pending Bill of Costs against the applicant due for taxation.

20. The parties filed submissions in support of their respective cases, which submissions were highlighted on the 19/5/2025.

21. The applicant submitted that the respondent's replying affidavit dated 10/4/2025 filed on the 12/4/2025 be expunged from the record for being filed late without leave of Court and in direct contravention of Court directions.

22. That the respondent's preliminary objection lacked merit and ought to be dismissed as it was not based on pure points of law. That the respondent was estopped from reneging on his promise of capping his fees for both the primary suit and the appeal at Kshs 116,000/- as per the letter dated 8/11/2008.

23. Further, that the advocate client relationship being contractual, it is adversely affected by Limitation of Action Act and thus he cannot purport to charge fees after the expiry of 6 years after the completion of the works as was held in the case of *Singh Gitau Advocates v City Finance Bank Limited* [2021] eKLR.

24. That the Preliminary Objection raised by the respondent raised issues of facts specifically the references pending before Court, the capacity of the applicant to file the suit and the issue of Limitation of Action as he is seeking release of funds and not enforcing a Judgement debt.

25. That the References referred to by the respondent were introduced through the Further Affidavit of 6/5/2025 and ought to be expunged and thus having failed to put documents on time the respondent cannot plead them in his submissions as submissions do not constitute evidence as was held in *D.T. Moi v Mwangi Stephen Mureithi* [2014] eKLR.

26. That the respondent be ordered to account for the monies received and that he pays the same to the applicant at market value as he had put the applicant out of use of the money for an inordinately long period of time and should be awarded costs.

27. It was submitted by the respondent that the OS filed by the applicant is a pleading and thus subject to the *Limitation of Actions Act* and time barred as judgement was delivered on the 4/6/2004 and thus the period of recovery of any proceeds ended in 2016 and as such the suit ought to be dismissed.

28. As regards the striking out of its affidavits, the respondent submitted that substantive justice requires that the matter be determined substantively as the rules of procedure are handmaids of justice.

29. That consequently the Court lacks jurisdiction to entertain the instant as it is premature and the Court ought to strike it out.

30. That the application is an abuse as it is meant to stifle the respondent's Bill of Costs as there are six matters pending against the applicant for taxation which ought to be protected at all costs as was held in the case of *United Insurance Co. Ltd v Edward Muriu Kamau* [2012] eKLR and *Njoroge Nani Mungai & Peter Munge Murage P/A Muriu Mungai & Co. Advocates* [2013] eKLR.

31. I have carefully considered the parties' pleadings and oral arguments. The first issue for consideration is whether the respondent's replying affidavits should be expunged.

32. On the 25/3/2025, this Court directed that the OS be responded to within 14 days; that the same be heard by way of affidavits; that leave to the applicant to put in a Further Affidavit within 7 days; that the parties exchange submissions within 28 days thereafter on a 14-day basis starting with the applicant; that time was of the essence and highlighting be on the 19/5/2025.

33. The respondent filed his replying affidavit of 10/4/2025 on 12/4/2025 and a further affidavit on the 6/5/2025. Both were filed out of time in view of the directions of 25/3/2025.

34. I have considered that the replying affidavit 10/4/2025 was late for only 2 days and that the applicant had an opportunity to respond to the same vide his further affidavit of 15/4/2025. There was therefore no prejudice that was suffered as a result thereof.

35. As regards the Further Affidavit of 6/5/2025, it is true that the same was filed without leave. However, I find that the applicant himself filed his Further Affidavit late, 30/4/2025 yet he was supposed to have filed it 7days after being served with the replying affidavit.

36. In view of the foregoing, I find that since there were infractions in the filing of both the Further Affidavits as far as the order of 25/3/2025 was concerned, it will be in the interests of justice that both be retained so as to determine the matter on merit.

37. I will now turn to the respondent's Preliminary Objection dated 12/3/2025. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, a preliminary objection was defined to be a pure point of law, which arises from the pleadings and which when argued is capable of disposing the matter. The same is not raised if there are facts to be ascertained.

38. In *Oraro v Mbaja* [2005] eKLR, it was held: -

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a 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. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

39. It is therefore clear that a preliminary objection cannot be based on disputed facts or facts requiring further enquiry. In the present case, the respondent's preliminary objection invites this court to consider a number of facts in determining the grounds raised therein. It is not a preliminary point of law and the same is hereby dismissed.

40. The next issue is whether the OS is time barred as contended by the respondent. It was the respondent's contention that since the funds the subject of the OS were decreed in 2004, the recovery thereof was time barred after expiry of 12 years, ie. by 2016.

41. With due respect, this is not a claim based on execution of a decree, but a claim by a client against his advocate. It is clear from the respondent's own affidavit that the issue of the amount due has been ongoing since the demise of the deceased.

42. In any event, even if it was argued that the amount had become irrecoverable by dint of *Limitation of Actions Act* as the demand for payment dates back to February, 2016 (see exh.AOO-13B), which is not the case, the same was revived the moment the respondent claimed a lien thereon and filed its bills of costs in March, 2025!

43. Accordingly, that contention has no basis and is hereby rejected. The applicant's OS is for consideration on merit.

44. The applicant seeks release of funds awarded to the estate of the deceased in a suit in 2004. The said monies are held by the respondent who acted as the advocate on record and received the same as such from the defendant in the subject suit.

45. On his part, the respondent contended that he cannot release the funds as he holds the same as lien for legal fees owed and which is pending determination in a series of References filed before this Court.

46. In *Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates* [2014] eKLR, the Court laid down the nature and extent of the Advocates lien as hereunder –

> " A review of case law in the context of an Advocate – Client relationship, will reveal that there is the general lien which confers upon the advocates the right to retain all papers, money or other chattel the property of their client which came into possession of the advocates as their clients' advocate until all the costs and charges due to the advocates are paid. 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.
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> 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.
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> 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.
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> 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)." (Emphasis added).

47. From the forgoing, it is clear that in order for an Advocate to successfully exercise the right of a lien, he has to demonstrate that at the date of the demand, there existed an Advocate-Client relationship between him and the party whose property he intends to exercise the right of a lien over, and that the costs in question must have been incurred.

48. In *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/A Chesaro & Co. Advocates* [2014] eKLR, it was held: -

> "It is clear from the foregoing that an Advocate's fees are not due until his Bill of Costs has been served on the client and where it is not settled, until it is taxed by the court. The client has exercised its rights under Order LII rule 4(1) (d) of Civil Procedure Rules which stipulates thus –
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> O. LII. r.4 (1) where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for-
>
> a. ...
>
> b. ...
>
> c. ...
>
> d. The payment into or lodging in court of any such money or securities."
>
> The Advocate has no right under any law to hold monies that which have come to him for onward transmission to his client as lien, at least no such law has been cited to the court. What the Advocate is doing by holding onto the Plaintiffs' monies, is irregular and the court cannot condone the same." (Emphasis provided).
>
> 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."

49. It is not in dispute that the respondent received the subject amount for and on behalf of the applicant. The record shows that the parties have had a frosty relationship and one of back and forth as far as the issue of legal fees, if any payable to the respondent.

50. What is most disturbing is that, it has been more than 10years since the duty to refund or account for the monies arose, 2016 and yet the advocate has not deemed it fit to do so. It is also unsettling that those so-called references nos. 130, 131 and 133 of 2017 took well over 7years to be dealt with. The Court was told that the same were eventually dismissed and what is pending is review applications.

51. It was alleged that there were two appeals on the issue of fees payable still pending before the Court of Appeal being Kisumu Civil Appeal 301 of 2004 & Kisumu Civil Appeal 280 of 2013. The advocate-client relationship between these parties seems to have lapsed way back in 2016. If there was any fees due from the client to the advocate, the advocate should have demanded the same within 6 years, being the contractual period. I doubt that any demand at this time would do unless the bills of costs in respect

thereof were filed within that time. The less I say about the alleged matters in the Court of Appeal the better as no bills of costs in respect thereof were exhibited.

52. As regards the latest bills that were filed after these proceedings were lodged, it is doubtful if fees for services offered in 2002 can be claimed now. That is an issue however that is left to the Court that will be dealing with those bills. For this Court however, the bottom line is that the said bills were only hurriedly lodged in an attempt to defeat the OS. That cannot stand. They are but an afterthought. They cannot defeat this OS and have no relevance to the same.

53. As it stands, it is not disputed that judgement was entered in his favour of the applicant in HCC 110 of 1996 – Thomas Adongo Onuko v Small Enterprises Finance Ltd & another as well as the costs awarded in Civil Appeal 280 of 2008 – Small Enterprises Finances Ltd v Thomas Adongo Onuko T/A Kisumu Expert Tailoring House and subsequently Kshs 1,080,000 was paid to the respondent out of which he only paid out to the applicant Kshs 401,000.

54. I agree with the Court's finding in the case of *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/A Chesaro & Co. Advocates* (supra) 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 and for this reason.

55. I find that the applicant has made a case for the grant of the orders sought in the OS. However, since there is evidence that some references were filed in respect of some outstanding fees and which have since been dismissed and what is pending is only review applications, and in order not to give an open-ended time frame within which the matter is to be resolved, I will make the following orders: -

    a. The Preliminary Objection dated 12/3/2025 is hereby dismissed with costs.

    b. The OS succeeds in terms of prayer nos. a) to d) thereof. However, the interest if any, shall run from the date of this ruling.

    c. Order No a) above is suspended for a period of 90 days within which the respondent should have prosecuted his review applications, in default of which order No a) above shall operate forthwith without the necessity of any order being made in respect thereof.

    d. The applicant shall have the costs of the OS in any event.

    It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE