REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 370 OF 2010

REPUBLIC……APPLICANT

VERSUS

HON. LUCAS M. MAITHA CHAIRMAN,BETTING CONTROL AND LICENSING BOARD.....1ST RESPONDENT

A.O. KWASI, DIRECTOR, BETTING CONTROL AND LICENSING BOARD.....2ND RESPONDENT

AND

FLINT EAST AFRICA LIMITED……1ST INTERESTED PARTY

NGATIA & ASSOCIATES……2ND INTERESTED PARTY

MAMA FATUMA CHILDREN'S HOME……BENEFICIARY

***EX PARTE:* INTERACTIVE GAMING AND LOTTERIES LIMITED**

RULING

Introduction

1. By a Motion on Notice dated 1st December, 2015, the firm of **Ngatia & Associates Advocates**, (hereinafter referred to as "the Firm") applied that it be joined as an interested party to these proceedings and that the orders made herein on 8th July, 2015 and/or consequential orders directing the apportionment and/or distribution of the funds in an account held by the said firm and the Chief Registrar, Judiciary (hereinafter referred to as "the Account") be stayed pending taxation of advocate/client bills of costs between the said firm and the *ex parte* applicant herein in a number of suits between the ex parte applicant and the interested party herein. It was further sought that the same orders be set aside and discharged and substituted with an order that the firm be entitled to offset and/or deduct all taxed costs due and owing from the *ex parte* applicant from the funds in the Account and the balance thereof be apportioned in such manner s may be

decreed by the Court.

2. The application was based on the allegation that the said firm is owed substantial fees by the firm's former client, the applicant herein, for legal fees rendered to the applicant and that the firm has a lien on the said Account therefor. To the firm, the funds are the only known asset of the applicant and in the event that the same is dissipated and/or apportioned in accordance with the order, the firm would be left with no recourse and/or means to satisfy the sums which may be allowed upon taxation.
3. After hearing the application *ex parte* on 2nd December, 2015, I granted an order joining the said firm to these proceedings and granted a temporary conservatory orders pending the inter partes earing of the application and fixed the matter for further orders on 9th December, 2015.
4. However by a Motion dated 10th December, 2015, the beneficiary to part of the said funds, **Mama Fatuma Children's Home,** sought the following orders:

1. THAT the application herein be certified urgent and fit to be heard on priority basis.

2. THAT this Honourable Court be pleased to vary and/or set aside the ex-parte stay order issued on 1st December, 2015 to the extent that the scope of the stay order be limited to the portion of the deposit and interest due and payable to Interactive Gaming and Lotteries Ltd.

3. THAT, in any event, the costs hereof be awarded to the Beneficiary/Applicant

The Beneficiary's Case

5. According to the Beneficiary, the aforesaid stay was issued on the mistaken premises that the deposit of Kshs. 50M held by Chase Bank Ltd in favour of the Beneficiary was still the property of the *ex-parte* Applicant, IGL. To the Beneficiary, however, nothing could be further from the truth as shown from the history of the matter.
6. It was disclosed that on 2nd September, 2011 the **Honourable Mr. Justice Musinga** (as he then was) ordered that a sum of Kshs. 50M deposited in court be transferred and held in a joint interest earning account in the joint names of the Firm and Chief Registrar of Judiciary and this was accordingly done at Chase Bank Ltd, Riverside Mews Branch, Nairobi under A/C No 0152030834007. Though the said Kshs. 50M was deposited by the applicant, it was for the benefit of the Beneficiary/Applicant herein, pending hearing and determination of the several disputes concerning the number of SMS's sent under the *Mzalendo Bora* SMS Lottery Campaign.
7. After protracted litigation in all the cases in court, the matters were resolved as follows:-

i. Total gross proceeds

Received = Kshs. 178,163,548.18

ii. Less 20% administrative

Charge = Kshs. 35,632,709.636

Kshs. 142,530,838.544

iii. 25% thereof payable to

Mama Fatuma **Kshs. 35,632,709.636**

Less paid Kshs. 1,000,000.00

iv. Balance due to

Beneficiary **Kshs. 34,632,709.636**

8. Pursuant to the foregoing, a consent was recorded in this matter on 8/7/2015 to disburse the principal sum of Kshs. 50M as follows:-

i. M/S Kyalo & Associates Advocates – Kshs. 34,632,709.636;
ii. M/S Nganga Mbugua & Company Advocates – Kshs. 15,367,290.364

9. However, there being no agreement on the disbursement of the interest, the parties made their respective submissions thereon and ultimately the court ruled on 30th September, that it be apportioned as per 4 above. It was the Beneficiary's case that the aforesaid determination was made pursuant to the provisions of S.36 of the ***Betting and Licensing Control Act*** (Cap, 131, Laws of Kenya) and has not been appealed nor objected to by any of the parties herein. By dint of the said order, as the property in the Kshs. 34,632,709.636 together with interest has vested in the Beneficiary and is no longer the property of the ex parte applicant, the firm cannot claim a lien over the whole of the Kshs. 50M since the only portion of the deposit available to the *ex parte* Applicant is Kshs. 15,367,290.364 plus interest. Conversely, the Beneficiary herein, has no interest whatsoever in the outcome of the intended taxation between the firm and the ex parte applicant since the firm have never acted for the Beneficiary.
10. It was contended that it is the overriding interest of the justice of this case that now that we head to the festive season the Beneficiary's portion of the deposit funds together with the interest be released to alleviate the further suffering of the beneficiary and the children and that in light of the foregoing unquestionable facts the interests of justice in this case will best served by this Honourable Court varying the order issued on 2nd December, 2015 so that its scope is limited to the portion of Kshs. 15,367,290.364 apportioned to the *ex parte* applicant plus interest and not to the entire deposit since the Beneficiary herein does not the Firm any money in the form of unpaid legal fees.
11. It was submitted on behalf of the Beneficiary by **Mr Kyalo**, learned counsel that the Firm is nolonger the *ex parte* applicant's advocates hence the Firm has no right to a lien which right inures by virtue of the existence of advocate/client relationship and not by the mere fact that the advocate is owed fees by the client. It was further submitted that the right to alien can only be urged by an advocate with full instructions in so far as he holds property belonging to the client. In this case the firm does not hold property belonging to the *ex parte* applicant. In any case whereas it may assert a right to a lien with respect to Kshs 15 million, it is not entitled to do so with respect to the full amount of Kshs 50 million. Because the Court has already made a determination that Kshs 34.4 million should be paid to the Beneficiary which consent fully determined the matter in contention in this matter and there is no challenge to that determination. It was contended that there are in any event no grounds disclosed justifying the setting aside of the said consent.
12. In support of the submissions, learned counsel cited **Barratt vs. Gough-Thomas [1950] 2 All ER 1048**, **In Re Rapid Road Transit Company [1909] 1 Ch. 96** and **Booth Extrusions (Formally) Booth Manufacturing Africa Limited vs. Dumbeyia Muturi Harun T/A Nelson Harun & Co. Advocates [2013] eKLR**.

Ex Parte Applicant's Case

13. The Beneficiary's application was supported by the *ex parte* applicant.
14. According to the applicant, the firm initially acted for the ex parte applicant in the suits set out in the supporting affidavit. While conceding that the funds herein were deposited by *ex parte* applicant in compliance with a condition precedent for maintenance of status quo issued by court on 29th December 2010, it was averred that following revocation of the lottery permit by the Respondent, the purpose for which the said funds were deposited ceased and the *ex parte* applicant applied for its release by court. In its determination, **Musinga J**. (as he then was) on 2nd September 2011, found that the Beneficiary was entitled to receive 25% of the lottery proceeds and while the issue of quantum payable to it was awaiting determination in HCCC 115 of 2011 and HCCC 281 of 2011, the said funds were directed to be preserved in an interest earning account in the joint names of the firm and the Chief Registrar of the Judiciary.
15. According to the applicant, the Court further ordered the applicant to disclose the total amount raised through the lottery and whether 25% thereto had been paid to the Beneficiary and if so documentary evidence to be provided within 30 days and the matter be mentioned on 3rd October 2011. In compliance with the said Orders, the Applicant under cover of a letter dated 28th September 2011 filed in court a Statement of Accounts on 28th September 2011 and an Affidavit by the Beneficiary confirming the proceeds payable to them in which the quantum of legal fees payable to the Applicant was set out as Kshs 3,350,000.00 which provision for legal fees was made by the applicant after consultation and indeed with the concurrence of the firm.
16. It was therefore contended that there has never been any dispute with the firm as regards the quantum of fees payable to it and no wonder since the Applicant ceased acting on 19th March 2013, no Bills of Costs were filed in court for taxation.
17. As regards the circumstances under which the applicant changed legal representation, it was contended that it was deceptive for the Applicant to suggest that the same was done 'surreptitiously'. To the contrary, the firm having elected to cease acting for the ex parte applicant, the *ex parte* applicant had no choice but appoint another counsel to handle the matter and despite an intimation by the *ex parte* applicant that it was ready to pay the fees as agreed and as set out in the said Statement of Accounts, the Applicant declined.
18. It was the ex parte applicant's case that it has at all times been ready, able and willing to pay the agreed fees of Kshs.3,350,000/- for all the cases the firm acted for it and that there being no dispute on quantum of fees payable to the firm, the ex parte applicant is prepared to have the Consent Order of 8th July 2015 varied to the extent that the said agreed amount of Kshs.3,350,000/- be paid out to the firm in full satisfaction of his fees and the balance together with interest be released to the ex parte applicant. It was however contended that the firm herein despite having acted for the *ex parte* applicant never disclosed details regarding the said interest earning account.
19. It was contended that the firm was at the time not a party to the suit and could not possibly have been involved in the apportionment of the funds. Besides, its recourse can only be as against the funds ordered to be paid to the *ex parte* applicant and not the Beneficiary hence the Application appears to be actuated by bad faith and a desire to delay having been brought more than 2 years after the firm ceased acting. To the ex parte applicant, if there was any dispute on quantum of fees payable to the firm, it should have filed his Bills of Costs immediately the Advocate-Client relationship terminated.
20. It was submitted by **Mr Ng'ang'a** learned counsel for the *ex parte* applicant that following the determination by **Musinga, J** on 2nd September, 2011 that there was legal entitlement to the funds by the Beneficiary, the character of the deposit changes and the consent that was recorded thereafter was premised on that decision. To entertain the Firm's application, it was submitted would amount to sitting on appeal on the said decision. It was therefore submitted that from that point the Firm was nolonger holding any funds for its clients hence the Firm's claim has no basis. To the *ex parte* applicant the Firm's claim in any event even if was valid would only be in respect

of the sum due to the *ex parte* applicant and not to the beneficiary.

The Firm's Case

21. On its part the firm opposed the application on the basis that the application was based on the Motion is founded upon the undernoted untrue fallacies:

    i. That the sum of Kshs. 50 million "was deposited by IGL for the benefit of the Beneficiary."
    ii. That the arrangement between Kyalo & Associates and Mbugua Ng'ang'a & Co. Advocates which was recorded as a "consent order" had the effect in law of "vesting" the apportioned sum upon the Beneficiary.
    iii. That as the 2nd Interested Party did not render legal services to the Beneficiary, the 2nd Interested Party has no lien on the Kshs. 50 million.
    iv. That given that it is towards year end, sympathy should dictate a summary process of releasing the sum apportioned to the Beneficiary in preference to a regular adjudication process.

22. According to the firm, by a Motion filed on 21st December 2010, the *ex parte* applicant sought orders to continue operating a public lottery up to 15th March 2011 which request was triggered by a notice that had been issued by the Respondent to the effect that the licence had been withdrawn as from 15th December 2010. Counsel for the ex parte applicant and the Respondent argued the matter before **Justice Warsame** who made an order on 29th December 2010 inter alia "**that the status quo be maintained on condition that the Applicant deposit a sum of Shs. 50 million within the next 2 days."**
23. To the firm, the amount was deposited in Court by the *ex parte* applicant and the public lottery continued to be operated until early 2011. It was averred that it is a requirement under the Betting Control and Licensing Board that a Licensee should demonstrate ability to pay the prizes which have been offered to the public and whereas the ex parte applicant had a bank guarantee in place, the High Court imposed the extra measure of a financial deposit of Kshs. 50 million as a guarantee that it shall honour the pledges made to the public. It was disclosed that the only persons who appeared before **Justice Warsame** were counsel for the ex parte applicant and **Mr. Mutinda**, state counsel appearing for the Respondent and during those proceedings, no reference was made regarding the donation that would ultimately be made to a charitable institution hence, it is plainly incorrect to contend that the sum was for the benefit of the Beneficiary.
24. As regards the 2nd untrue statement, apportionment of the amount between the two law firms was pursuant to an arrangement between counsel as opposed to an adjudicative process and since parties cannot confer to themselves rights which they are not entitled to, the consent did not vest that which was not available for distribution without taking into account the rights of the firm. It was further averred that the Beneficiary cannot found its claim on the wrong-doing of apportionment which was carried out without involvement of persons who were entitled to be heard. The consent order was irregularly recorded and the firm has applied to discharge the order in its entirety. Prior thereto, it would be prejudicial to remove part of the sum of Kshs. 50 million away from the merit review of the validity of the consent order.
25. According to the firm, it was due to its legal services that funds were not released to the interested party but were retained for the benefit of the ex parte applicant thus simplistic to merely consider whether the firm acted for the Beneficiary. The correct position is to appreciate that it was due to the legal services the firm rendered that the funds are available.
26. In the firm's view, the Beneficiary did not invest any effort in the public lottery or the litigation between the contestants and it is after the litigation was completed and accounts were being contested that the firm advised that the Beneficiary be invited to come on board. It was therefore

its view that it is manifestly desirable that the fees due to the firm be ascertained and thereafter all the parties be accorded an opportunity to either agree on apportionment or the rights thereof be adjudicated by Court.

27. In the firm's view, it is a fallacy for the Beneficiary to consider that it has a prior right to the funds which contention is untrue.
28. On behalf of the Firm it was submitted by **Mr Kiragu Kimani**, its learned counsel that the power of variation is discretionary and it is only in cases where it would serve useful purpose that the same is to be exercised and reliance was placed on **Godfrey Masaba vs. IEBC & 2 Others [2013] KLR**. It was submitted that the instant application seeks to remove the Beneficiary together with two thirds of the subject matter from the ambit of these proceedings before the rival claims are investigated. In learned counsel's view, the issues raised in this application ought to have been argued at the hearing of the firm's application where the determination as to whether or not the Firm has a lien over the whole amount would be determined.
29. It was submitted that the money deposited was held by the service providers for the ultimate beneficiary and not specifically to the Beneficiary herein. The money, it was submitted was deposited as security to enable the *ex parte* applicant continue running the lottery. Since the order of 8th July, 2015 is being challenged it was submitted that it would be wrong to grant the prayers sought in this application before the said matter is determined. Based on Order 52 of the ***Civil Procedure Rules***, it was submitted that an advocate claiming his costs is required to make his application in the same suit and the Court is required to preserve and secure he funds the subject thereof. Since the basis of the decision not to release the money was the rival claims, it was submitted that the issue of the change in the character does not arise. To allow the instant application would in learned counsel's view amount to stealing a march on the Firm and reliance was placed on **Kamau Mucuha vs. Ripples Ltd [1993] eKLR, Moore Stephens vs. Stones Rolls Limited [2009] UKHL** and **M/S Gusii Mwalimu Investment Ltd & 2 Others vs. M/S Mwalimu Hotel Kisii Ltd [1996] eKLR**.

Determinations

30. I have considered the issues raised by the parties to this application.
31. The discretion to set *ex parte* orders and judgements, it has been held:

"…is a wide and flexible one, and is exercised upon terms that are just. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice…In exercising the discretion the Court should consider among other things the facts and circumstances both prior and subsequent and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgement which would not or might not have been present had the judgement not been *ex parte.*

See **Patel vs. EA Cargo Handling Services Ltd [1974] EA 75; Shah vs. Mbogo [1967] EA 116; Philip Chemwolo & Another vs. Augustine Kubende [1982-88] KAR 1036.**

32. Applications to set aside *ex parte* orders are by no means rare. They are of frequent occurrence and they occur due to different reasons in different cases. The aim being to do justice between the parties, the court has been given wide and unfettered discretion, but to be exercised judicially, to set aside or vary such orders inter alia in the exercise of the inherent powers of the Court reserved in section 3A of the ***Civil Procedure Act*** to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

33. That the Court retains a residual power in nolonger in dispute. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself inter alia as follows:

"It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

34. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 Of 2005** held:

"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

35. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.
36. It therefore follows that this Court has the power to review and vary its orders made herein on 2nd December, 2015 on such terms as are just.
37. It is clear beyond paradventure that the applicant herein, the Firm of Ngatia & Associates was not and has never been a party to these proceedings. The substance of its claim is that having acted in these proceedings, it is entitled to have its costs determined and paid period. Ordinarily, it is the client instructing the advocate that is under a legal obligation to pay the client. That, in my view, is the clear explanation of the provision for only two types of bills costs – Client and Advocate Bill and Party and Party Bill of Costs. There is no Advocate and Party Bill of costs. So that even in situations where costs are awarded to a party, those costs belong to the party and not to the advocate but the advocate in entitled to retain the same by way of a lien pending the determination and payment of his costs. However by the mere virtue that the advocate retains a lien over the same does not elevate the advocate to the position of a party to the suit. That is the legal position and this Court does not have to await the determination of the issues herein to make such basic pronouncement. This position was restated in **Barratt vs. Gough-Thomas** in which the Court stated that:

"The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an encumbrance or equitable charge. It is merely passive and possessory, that is to say, the solicitor has no right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents or other personal property of his client or former client – in the words of Sir E. Sugden in *Blunden vs. Desart* (2) (2 Dr. & War. 48): "...to lock them up in his box, and to put the key into his pocket, until his client satisfies the amount of the demand." It is wholly derived from, and, therefore, co-existensive with, the right of the client to the documents or other property...the capacity by reference to which the documents are held is essential. The absence at any time of any right, to or property in the documents on the part of the client, seems, as a matter of principle, fatal to the continued existence of the lien."

38. Similarly in **Booth Extrusions (Formally) Booth Manufacturing Africa Limited vs. Dumbeyia Muturi Harun T/A Nelson Harun & Co. Advocates** (supra) **Onguto, J** expressed himself as follows:

"There is no doubt that this case raises sharply the question as to the nature and extent of an advocate's lien. In its simplest application a lien generally depends on "the fundamental principle that one party to a mutual contract cannot enforce performance of its obligations in his favour without giving or tendering performance of the obligations incumbent upon himself": See John D. Hope & Co. vs. Glendinning [1911] AC 419, 413. Simply put the legal notion of a lien is the right to resist a demand for performance of an obligation until a counter obligation is performed by the person demanding...The policy underlying liens briefly puts it 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, the advocate having a retaining lien over documents in his possession is entitled to retain the documents against the client until the full amount of his costs is paid...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...In so much however as the lien protects the advocate, the general lien confers only a right to retain the property. It exists for no other purpose...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...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 (mortgagor) to possession as solicitor to and on behalf of a different client (mortgagee). The lien will also be ousted and lost where it is expressly excluded by agreement between Advocate and client...It is also lost where the client who delivered the documents or chattels has a lesser right than a third party...The basis for this proposition being perhaps that an advocate cannot claim a lien on documents where her or his client would not be entitled to withhold the documents against a third party...Effectively that would also mean that if the third party has no higher right to claim the documents than the client then the third party's claim is subject to the lien...an advocate cannot have a better title than his client."

39. In **Re: The Resident's Magistrate's Court (Nairobi) (1929-1930) LRK 66**, **Sheridan, J** stated:

"An attorney or solicitor's lien is a creature of the Common Law. In the case of *In re Sullivan vs. Pearson, ex parte Morrison, 4QB (1868)* page 153 at 154, Blackburn, J., expresses himself: 'There is no doubt at all that where an attorney has by his labour or his money, obtained a judgement for his client, he has a lien upon the proceeds of such judgement.' Although advocates in this

country may occupy a different point from solicitors in England in many respects, in regard to the matter under consideration, which is quite different from the point decided in *Rasul Bux vs. Dalal*, they seem to me to occupy the same position, and in my opinion the words of (4) 2 of Kenya Colony Order in Council, 1921, are sufficiently wide to allow of the application of the 'common law lien' doctrine in the case of advocates in Kenya. At page 820, paragraph 1342 of *Halsbury's*, Vol 26, it is stated:- 'A solicitor has at common law and apart from any order of the court or statute a lien over property recovered or preserved or the proceeds of any judgements obtained for the client by his exercise.'".

40. With respect to the exercise of the right to a lien, a general lien and a particular lien are both categories of a legal lien and a lien is a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied. See ***Halsbury's Laws of England (4th Ed) Para 502 at 221*** and **Unibilt Kenya Ltd (Under Receivership) vs. Mukhi and Sons Ltd [2004] 2 EA 340.**
41. It is therefore clear that a lien is a possessory right as opposed to a proprietary right. Where therefore a person who would otherwise have a right of a lien over a property legally loses possession thereof it has been held that the lien is lost. In **Dhanji vs. Machani Dar-Es-Salaam HCMCC No. 34 of 1969 Georges, CJ** held:

"The right conferred by section 173 is a right of retention of things received by an agent and there can be no retention unless there has been possession in the first place. Therefore under section 173, as under the English Law, a lien cannot exist unless the lien-holder is in possession. A legal lien is lost if possession is lost, so that redelivery of the goods to the owner or his agent destroys the lien and when once made cannot be recalled, even if made by mistake; but if redelivery is induced by fraud or otherwise wrongfully obtained the lien revives if possession is recovered, even though the recovery is effected by a stratagem. There is no such a thing as a notional lien and the court has no power to allow an applicant to part with possession while retaining his rights as a holder of a legal lien... It would appear that a lien can be based only on possession of the property over which it is claimed and the right to retain it. It confers no right to sell the property and if the owner takes possession by fraud the lien-holder would have the right to retake possession and, if successful, could not be sued in detinue by the owner."

42. What then is the position where a sum of money is deposited in an account in the joint names of the counsel for the parties pending, say, the hearing and determination of an appeal" As long as the stay is in place pending the determination of the appeal, none of the parties can claim entitlement to the amount and therefore at that stage no right to a lien can be claimed. However, upon determination of the appeal any of the counsel whose client is determined to be entitled to the said fund may claim a lien thereon for the payment of his fees. That therefore means that the advocate whose client is unsuccessful cannot lay claim to that money as his client's entitlement has been extinguished and a right to a lien by an advocate can only arise where his client is entitled to the money in question. Again for the right to a lien to succeed, the advocate must be in possession of the funds. Where the advocate is nolonger, lawfully, in possession of the funds or the client's property, the right to a lien cannot be claimed. In this case it is not in doubt that the Firm ceased acting for the ex parte applicant herein. It is not contended that the Firm was unlawfully removed from the record. However, the funds which were deposited were still in account bearing the Firm's name. Whether in those circumstances the Firm can successfully claim the right to the sum in the said account is the subject of the yet to be heard and determined application.
43. However, from the authorities it is clear that the Firm will only be entitled, if at all, to the sum due

to the ex parte applicant herein which was its client. However, a lien is simply security for an advocate's fees and an advocate is not entitled to exercise a right to alien in respect of the whole property when his costs can only be recovered from part only of the property. In other words, the lien ought to be commensurate to the claim for fees and no more.

44. In this case, I cannot determine at this stage and the Firm has not indicated the amount it claims in respect of its fees. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**
45. In the premises balancing the interests of the parties herein, I hereby vary the order given herein on 2nd December, 2015 and direct that the stay granted herein will only apply to the principal sum due to the *ex parte* applicant herein as well as the interests. In other words the principal sum due to the beneficiary minus interests will be released to the beneficiary pending the determination of the Firm's application.
46. The costs of this application to abide the determination of the Firm's application.
47. It is so ordered,

Dated at Nairobi this 22nd day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ng'ang'a Mbugua for the ex parte applicant

Mr Kiragu for the 2nd interested party/applicant firm

Mr Kyalo for the beneficiary

Cc Muriuki