



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 119 OF 2016

BETWEEN

SAMUEL MBURU GITERE.....1ST PLAINTIFF

ANNE WANJIRU GITERE.....2ND PLAINTIFF

BOTH SUING ON BEHALF OF

GITERE KAHURA INVESTMENTS LIMITED

AND

KENNETH KIMARI GITERE.....1ST DEFENDANT

DAVID WAKANGU GITERE..... 2ND DEFENDANT

NATIONAL BANK OF KENYA.....3RD DEFENDANT

CHABRIN AGENCIES LIMITED.....4TH DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....5TH DEFENDANT

LUCAS WAITHAKA GITERE.....6TH DEFENDANT

RULING

1. The subject of this suit is a family company, Gitere Kahura Investments Limited (“the Company”) incorporated by Gitere Kahura and Nyokabi Kahura in 1977. The original shareholders are now deceased and there now appears to be a dispute regarding membership and control of the Company. The dispute is however not the subject of this ruling. It is the fact that the Samuel Mburu Gitere and Anne Wanjiru Gitere have purported to file this suit on behalf of the Company.

2. This precipitated the 1st, 2nd, 4th and 6th Defendants to file a Notice of Preliminary Objection dated 25th April 2016 seeking to strike out the suit on the ground that the Plaintiffs are incompetent and have no capacity to institute this suit on behalf of the Company without permission of the court in accordance with **sections 238 and 242** of the **Companies Act, 2015**. The Plaintiffs’ admit that they have filed this suit as a derivative suit but that the issue of capacity cannot be raised as a preliminary objection and that in any case, based on the facts, the court should grant leave for the matter to proceed as a representative suit.

3. The fundamental objection raised by the Plaintiffs is that the preliminary objection is not a preliminary objection within the meaning of the **Mukisa Biscuits Ltd v West End Distributors [1968] EA 696** where Sir Charles Newbold P., observed that:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

4. Although the Plaintiffs admit that they have not sought leave, I am mindful of the fact that **section 239(1)** of the **Companies Act, 2015** allows a party to apply for permission to proceed with the suit as a derivative suit in the course of proceedings. It states:

239(1) In order to continue a derivative claim brought under this part by a member, the member has to apply to the court for permission to continue it.

5. It is for this reason that I am unable to entertain the preliminary objection as the Plaintiffs have a statutory right to apply for permission to proceed with the suit as a representative suit. The court in deciding whether or not to grant permission exercises discretion based on the facts supported by evidence. In this case, it would therefore be important for the Defendants to be given an opportunity to oppose such an application. It appears that in fact, the Plaintiffs filed an application dated 11th June 2018 for permission to proceed with the suit as a derivative suit. That application must now be heard.

6. I am also cognizant of what the Court of Appeal stated in **D. Chandulal K. Vora & Co. Ltd v Kenya Revenue Authority NRB CA Civil Appeal No. 283 of 2012 [2017] eKLR** that

The main consideration for the court is to do justice to the parties in a suit. The discretion to dismiss a suit or to strike out an appeal or pleadings generally should be exercised sparingly and judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantial justice to the parties over and above the strictures of the rules of procedure, which have been stated to be mere hand maidens of justice.

7. Let the application for permission be urged on its merits. In the meantime, the other applications to strike out the suit or otherwise shall await determination as to whether in fact the suit is in fact competent.

8. The Preliminary Objection dated 26th April 2016 is dismissed. Costs in the cause.

DATED and DELIVERED at NAIROBI this 27th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Mr Gacheru instructed by Gacheru Ng'ang'a and Company Advocates for the Plaintiffs.

Ms Nyabuto instructed by A. G. N. Kamau Advocates for the 1st, 2nd, 4th and 6th Defendants.

Mr Mutua instructed by Mutua Waweru and Company Advocates for the 3rd Defendant.