



REPUBLIC OF KENYA



KENYA LAW
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Gitere & another (Both Suing on behalf of Gitere Kahura Investments Limited) v Gitere & 5 others (Civil Case 119 of 2016) [2023] KEHC 2318 (KLR) (Commercial and Tax) (22 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 119 OF 2016
DAS MAJANJA, J
MARCH 22, 2023**

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. On February 5, 2021, the court declined to grant the plaintiffs permission to proceed with the suit as a derivative suit and struck it out with costs to the defendants. the defendants filed their Party and Party Bills of Costs (“the Bills of Costs”) which were taxed and form the basis of this decision. The 5th defendant’s Bill of Costs was taxed on June 24, 2022 and costs certified at Kshs. 615,630.00. The 3rd Defendant’s Bill of Costs was taxed on July 21, 2022 and costs certified at Kshs. 519,195.00 and the 1st, 2nd and 6th defendants’ Bill of Costs was taxed on August 25, 2022 and costs certified at Kshs. 611,740.00.



2. The plaintiffs have now filed the Chamber Summons dated October 6, 2022 (“the Reference”) made under Paragraph 11 of the *Advocates Remuneration Order* (“the Order”), Order 42 Rule 6 of the *Civil Procedure Rules*, sections 1A, 1B and 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and articles 47, 50 and 159(2)(d) of the *Constitution*. They seek to set aside or vary the respective Rulings of the Deputy Registrar and that the court stay their execution. The Plaintiffs further seek a declaration that the taxed or re-taxed costs are to be borne by Gitere Kahura Investments Limited (“the Company”) and not by Anne Wanjiru Gitere and Samuel Mburu Gitere, the plaintiffs herein. Alternatively, the Plaintiffs seek a declaration that they are entitled to offset the already taxed costs or the costs to be re-taxed in this matter, against the monies owed to them by the 1st, 2nd and 6th defendants as their share of the Estate of Gitere Kahura and that it is immoral, unconscionable and unjust for the Defendants to recover the costs from them. The plaintiffs further seek an alternative order that the court stay execution of the payment of the taxed costs or costs to be re-taxed in this matter pending the hearing and determination of Nairobi Civil Appeal No. E481 of 2021; Anne Wanjiru Gitere and another v Kenneth Kimari Gitere and 5 others, being the appeal against the ruling of the court that gave rise to the taxed costs.
3. The application is supported by the grounds on its face and the affidavit of Anne Wanjiru Gitere sworn on October 6, 2022. It is opposed by the 1st, 2nd and 6th defendants through the replying affidavit of the 1st defendant sworn on December 6, 2022, by the 3rd defendant through the Grounds of Opposition dated February 13, 2023 and by the 5th defendant through the Grounds of Opposition dated February 1, 2023.
4. The plaintiffs urge that the Deputy Registrar rejected their objection that the Bills as drawn were fatally defective for being directed against a wrong party as they ought to have been made against the Company. That the Deputy Registrar ignored and or failed to take into account the decision made by the Deputy Registrar on October 5, 2021 in High Court Misc. Application No. E108 of 2021 striking out the Bill of Costs with costs assessed at Kshs. 10,000.00. The plaintiffs state that it was directed that the said sum be offset against the amounts to be taxed in the 1st, 2nd and 6th defendants’ Bill of Costs. The plaintiffs complain that the Deputy Registrar did not deal with this order and that this court has jurisdiction to deal with the matter.
5. The plaintiffs contend that due to the disputes between the parties over the management of the Company and the Estate of Gitere Kahura (Deceased), they are owed about Kshs. 12,812.450.00 by the 1st, 2nd and 6th defendants hence it would be inequitable and unfair to order them to pay costs of the suit.
6. The plaintiffs contend that they have appealed to the Court of Appeal against the decision of February 5, 2021 and that the said appeal is arguable and has high chances of success and is being fast tracked for hearing. They urge that it is only fair that the payment of the taxed costs be stayed pending the outcome of that appeal. They invoke articles 47 and 50 of the *Constitution* that guarantee their right of access to justice and to a fair trial to support their case.
7. The defendants took common positions to oppose the application. They state that the taxed costs were directed at the plaintiffs who instituted this suit in their own capacity and not on behalf of the Company. They contend that the plaintiffs always referred to themselves as “plaintiffs” and that they sought permission to proceed with the suit as a derivative claim hence they cannot claim that it is the Company that filed this suit. In any case, they contend that the Company has never instructed and/or authorized the plaintiffs to file the suit.



8. The defendants contend that the plaintiffs' application seeking permission to continue the suit as a derivative claim having been dismissed, the dismissal still stands as it has not yet been set aside, varied or vacated. The defendants thus insist that the taxed amounts are recoverable from the plaintiffs individually and not from the Company. They submit that the Deputy Registrar did not err in principle or that the taxed amount was not inordinately high or low to warrant a review and/or setting aside by this court. The defendants further contend that the purported sum of Kshs. 10,000.00 was not part of the proceedings before the court, has no connection to this suit and is irrelevant to the suit and application before the court.
9. The defendants also aver the plaintiffs have not made out a case for the grant of an order of stay of execution. They submit that they are entitled to execute for the costs they are entitled to and that it is insincere for the Plaintiffs to purport to seek a stay of execution through a Reference under the provisions of the *Advocates Act* (Chapter 16 of the Laws of Kenya).

Analysis and Determination

10. The plaintiffs have filed an omnibus application seeking disparate orders. The main and substantial orders are in respect of the taxation.
11. The Court of Appeal in *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR reiterated the principle that the court dealing with a reference from a taxation will not normally interfere with the decision of the taxing officer unless the taxing officer erred in principle in assessing the costs. In *Premchand Raichand Ltd and another v Quarry Service of East Africa Ltd and another* [1972] EA 162, the court stated as follows:

The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.
12. On the Reference, the plaintiffs' grievance is that it was wrong for the Deputy Registrar to direct them to personally pay the taxed costs rather than the Company and that they were entitled to a credit of Kshs. 10,000.00 from High Court Misc. Application No. E108 of 2021.
13. The ruling of February 5, 2021 was the result of the determination of the Amended Notice of Motion dated June 11, 2018 filed by Samuel Mburu Gitere and Anne Wanjiru Gitere who referred to themselves as plaintiffs and who admitted that they were filing the suit as a derivative claim on behalf of the Company. In the said ruling, the court declined to grant the plaintiffs permission to proceed with the suit as a derivative suit on behalf of the Company and as a consequence, the court struck out the suit.
14. Without the court granting permission to the plaintiffs to proceed with the suit as a derivative suit on behalf of the Company, the suit remained a personal suit filed by the plaintiffs and not one filed by the Company. As a result, the costs flowing from the dismissal could only be borne by Samuel Mburu Gitere and Anne Wanjiru Gitere and not the Company. Had the plaintiffs been granted permission to proceed with the suit as a derivative suit on behalf of the Company and an adverse decision made against it, then the order would have been against the Company and not the plaintiffs. The court's position on the plaintiffs personally bearing the costs when their application for permission to continue a derivative claim on behalf of the Company is declined is consistent with what the court has ordered in similar matters (see for example *Gbelani Metals Limited and 3 Others v Elesb Gbelani Natwarlal and another*



ML HCCC No. 102 of 2017 [2017] eKLR). For the avoidance of doubt, I hold that costs are to be shouldered by Samuel Mburu Gitere and Anne Wanjiru Gitere.

15. In any case and I agree with the defendants that it was not within the jurisdiction of the Deputy Registrar to determine whether the Company or the plaintiffs should bear the costs. The Deputy Registrar is bound by the order of costs made by the court and can only proceed to tax the bill of costs in accordance with the order for costs. This ground by the plaintiffs therefore fails.
16. On the contention that the plaintiffs were entitled to a credit of Kshs. 10,000.00 from High Court Misc. Misc. Application No. E108 of 2021, I find that the plaintiffs have not demonstrated any connection between that application and this matter, let alone furnishing the order stating that Kshs. 10,000.00 be credited in the present Bills of Costs. The plaintiffs are entitled to recover the costs awarded in the usual manner if they so wish. This ground of reference therefore fails.
17. The plaintiffs have raised several issues concerning the Company and the estate and in particular that they are owed money by the other parties and that the costs ought to be offset against their claims to the estate and the Company. The subject of this Reference are Party to Party Bills of Costs filed by the defendants. These proceedings are separate from any other proceedings and this court rejects the plaintiffs' entreaty to include this case in the other proceedings. The plaintiffs' have the right to seek relief in the other matters.
18. Turning to the application for stay of execution, the plaintiffs argue that their pending appeal is arguable and has a high chance of success. It is not in dispute that the plaintiffs are appealing against the ruling dismissing their application seeking permission to proceed with this suit as a derivative action on behalf of the Company. The order appealed from is a negative order that cannot be stayed as the court has not ordered any party to do anything that can be stayed (see *Western College of Arts and Applied Sciences v Oranga and others* [1976] KLR 63 and *Kenya Commercial Bank Limited v Tamarind Meadows and 7 others* [2016] eKLR). The only thing capable of being stayed is execution of costs. The costs have now been ascertained and the Reference, as is apparent, dismissed. To grant a stay of execution pending appeal in respect of costs at this stage would be premature.

Disposition

19. For the reasons I have set out above, I find that the Deputy Registrar's Rulings dated June 30, 2022, July 21, 2022 and August 25, 2022 were based on the correct principles of law and taxation. I do not find any valid reason to interfere with the certified costs. Likewise, the other prayers in the application lack merit.
20. The Chamber Summons dated October 6, 2022 is dismissed. For the avoidance of doubt, Anne Wanjiru Gitere and Samuel Mburu Gitere shall pay the costs which are assessed at Kshs. 15,000.00 in respect of each Bill of Costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH 2022.

D. S. MAJANJA

JUDGE

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

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

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

Mr Mubea instructed by Kimondo Mubea and Company Advocates for the 5th Defendant.

