



REPUBLIC OF KENYA



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Nganju & 2 others (Sued in their capacity as the Chairman, Secretary and Treasurer of M/S Githunguri Social Club) v Mugi (Civil Appeal E040 of 2021) [2023] KEHC 1907 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E040 OF 2021
MM KASANGO, J
MARCH 17, 2023**

BETWEEN

JOHN MUKIRI NGANJU 1ST APPELLANT

EDDIE WARUIRU NJUGUNA 2ND APPELLANT

KENNEDY KARANJA MURIMI 3RD APPELLANT

**SUED IN THEIR CAPACITY AS THE CHAIRMAN, SECRETARY AND
TREASURER OF M/S GITHUNGURI SOCIAL CLUB**

AND

DANIEL MBIRI MUGI RESPONDENT

(Being an appeal from the judgment of the Senior Principal Magistrate's Court at Limuru (Sandra Ogot, RM) in Civil Case No. 147 of 2014 dated 22nd December, 2017)

JUDGMENT

1. Before embarking on the substance of this appeal, I will give a brief background of the action that was before the trial court.
2. The respondent filed a case before the trial court. Parties entered into a consent which was adopted by the court, as an order of the court on January 11, 2016. By that consent, the appellants and respondent agreed that an all-inclusive judgment be entered for the respondent for Kshs.4,400,000. The consent was that, upon the amount being paid to the respondent, the case would be marked as settled.
3. The appellant by an application dated 5th February, 2016, filed before the trial court challenged the validity of the parties' consent. The trial court dismissed that application by holding that the consent was valid. The appellant being aggrieved by the decision filed before this Court Civil Appeal No. 39 of 2016. Justice Joel Ngugi (as he then was) upheld the Ruling of the trial court by finding there was



a valid consent judgment. That appeal was dismissed with costs to the respondent. Thereafter, the respondent filed a party and party Bill of costs before the trial court for the taxation of the costs of the suit before the trial court. The trial court taxed those costs in the absence of the appellant though the appellant had been served with a notice. A certificate of costs was issued to the respondent. The respondent filed an execution application for further issue of warrants of attachment of appellants' moveable properties. That execution was for recovery of the taxed costs. The warrants were issued to Fantasy Auctioneers. The execution process provoked the appellants to file before the trial court a notice of motion application dated February 28, 2020. The appellants' prayers in that application was for striking out or dismissal of the respondent's execution application, the lifting/vacation of the warrants of attachment and for costs of the application. Those prayers are grounded on the following foundations:-

- a. That the consent judgment was all inclusive and the suit should have been marked as settled on the judgment being paid.
 - b. The execution could not proceed in the absence of a drawn decree.
 - c. That the taxed Bill of Costs was not in compliant with Schedule 7 of the *Advocates (Remuneration) Order*.
 - d. That the respondent sought to execute against the appellants in their personal capacity when in fact they were sued as representing the Githunguri Social Club.
4. That application was dismissed by the trial court through a Ruling dated March 11, 2021. The dismissal aggrieved the appellant and consequently, this present appeal was filed. The appellants raised the same grounds in their application in this appeal, that is; the trial court erred in failing to hold that the respondents' execution could not proceed in the absence of a decree; erred in failing to find execution should not have proceeded against appellants in their individual capacity and in failing to find costs were not payable to the respondent in the light of the all-inclusive judgment.
5. The trial court's impugned Ruling dated March 11, 2021 made a finding that the appellants erred to challenge the taxation of costs through an application rather than through a reference as provided under the Advocates (Remuneration) Order and on that ground the trial court held the execution of those costs was valid. The trial court also expressed itself by stating the appellants ought to have filed an appeal rather than filing the application to set aside execution.

Analysis

6. There are four issues that require determination in this appeal. They are:-
- a. Did the magistrate's court err in taxing costs?
 - b. Can execution for costs proceed in the absence of a decree?
 - c. Did the trial court err to permit execution against respondents in their personal capacity; and
 - d. Did the appellant err in filing the application before the trial court and not file an appeal?

Issue (a)

7. A magistrate's court does not err if it entertains a taxation of costs so long as such taxation remains within the perimeters of Schedule 7 of the Advocates Remuneration Order. Per se, there is no illegality in the magistrate taxing costs as conventionally taxed by the High Court so long as the taxation is within



the boundaries of schedule 7. This was the holding in the case *Benard Gichohi Njira v. Kanini Njira Kathendu & another* (2015) eKLR thus:-

“This court is minded and indeed persuaded by the decision in the case of *Peter Njuguna Njoroge v Julius Naraniak Olopolimot* [2010] eKLR where Justice Anyara Emukule made the following observations which this Court agrees with:-

‘I have examined the plaintiff’s bill (Bill of Costs) drawn on December 21, 2005 and it substantially conforms to the requirements of Schedule VII of the Advocates Remuneration Order. Perhaps the only arguable departure is that it is termed a bill of costs. It might have been called the plaintiff’s or defendant’s costs and set out in conformity with the requirements of Schedule VII of the Advocates Remuneration Order. I do not propose to strike out the plaintiff’s Bill of Costs. ... A magistrate is allowed and/or mandated by law to assess or tax costs payable in a given case. The words or terminology used whether “assess” or “tax” is immaterial in my view. The bottom line is to determine the total amount of costs payable. The fact that a magistrate has taxed or used the terminology “taxation” to assess or determine costs payable is not fatal if the bill presented before the court is in compliance with the requirements of Schedule VII of the Advocates Remuneration Order.’”

8. Having reached the conclusion that a magistrate can tax costs, there is however a corollary sub-issue to consider. That is, was the respondent entitled to seek costs having entered a judgment by consent which included costs? In my view, the respondent’s Bill of Costs which contained charges or items that were of the trial court was indeed filed in error. The consent judgment was clear that the amount of consent was all inclusive. That however as it may be, the appellants rather than filing an appeal to the High Court against that taxation proceeded to file an application dated February 28, 2020 to strike out execution application and for vacation of warrants of attachment. There was no prayer in that application seeking to review the order of taxation. Parties are bound by their pleadings and the appellant therefore is bound by the prayers in the application dated February 28, 2020. It was not enough for appellant to take to task the taxation of the Bill of costs in the affidavit in support of the application. There was need specific prayer to be presented in the application seeking review/set aside of the taxation. There was no such prayer. In the absence of a prayer the trial court in the impugned Ruling did not err in declining to entertain the challenge of the taxation.

Issue (b)

9. With respect to execution of costs in absence of a decree, I start by affirming that there is no error in allowing that execution. section 51 of the *Advocate’s Act* requires there be a Certificate of Taxation for judgment to be entered of the taxed costs. A decree is not a necessary requisite at all to execution of those costs. The issue (b) is therefore determined by a finding that execution of taxed costs does not require a decree to be drawn.

Issue (c)

10. The appellants were sued in their personal names as the Chairman, Secretary and Treasurer of Githunguri Social Club. The appellants have argued in this appeal as well as before the trial court that having been sued as officials of a club the execution undertaken against them personally was in error. The appellants did not elaborate either before the trial court or before this Court why the execution was in error.



11. I have perused the Amended Plaintiff. The respondent by that plaintiff pleaded that the appellants in disregard to the “Societies Constitution” (sic) they failed to award the respondent the value of the shares he held in the club. No evidence was placed before the trial court or this Court show whether the Githunguri Social Club was an incorporated entity. If indeed it is not incorporated, the Githunguri Social Club cannot have court action issued against it nor can it sue in its name. a case in point is the case of *Simu Vendores Association vs. Town Clerk, City Council of Nairobi & another* (2005) eKLR thus:-

“...the decision of Justice Bosire (as he then was) in HCCC No 5116 OF 1992 (O.S.) – *Free Pentecostal Fellowship In Kenya v Kenya Commercial Bank*, in which he decided as follows:-

‘The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 *Civil Procedure Rules*. In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name.’

I wholly agree with the said decision. The applicant being a society and unincorporated lacked the capacity to institute these proceedings. It is not a legal person or corporate body.”

12. This court as well as the trial court was left by the appellants to guess of the status of the club. in view of that uncertainty, this court declines to find that execution against the appellant in this personal capacity was in error.

Issue (d)

13. The appellants as correctly stated by the trial court having not sought review but rather sought striking out of an order of another magistrate was tantamount to seeking appeal by a magistrate from a decision of another magistrate of coordinate jurisdiction. The trial court had no legal basis to overrule the decision of another magistrate of coordinate jurisdiction. This court therefore finds in affirmative that the appellant erred in filing the application before the trial court and failed to appeal the decision instead. The trial court correctly found the appellants’ remedy lay in an appeal.

14. In the end, this appeal is without merit and is dismissed with costs.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant : Mourice/Julia

Instructed by Saluny & Co. Advocates for appellants: - Mr. Wekesa

Instructed by Gachoka & Co. Advocates for the Respondent:- N/A

JUDGMENT delivered virtually.

MARY KASANGO



JUDGE

