



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**SUCCESSION NO. 268 OF 2014**

**IN THE MATTER OF THE ESTATE OF KAGWIMI GATEGA .. DCD**

SOPHIA KARUANA KARANI.....1<sup>ST</sup> APPLICANT

LUCY WANGECHI.....2<sup>ND</sup> APPLICANT

JULIA MUTHONI.....3<sup>RD</sup> APPLICANT

MARGARET WAINOI.....4<sup>TH</sup> APPLICANT

MARY WANJIRA.....5<sup>TH</sup> APPLICANT

**V E R S U S**

STEPHEN MUCHIRA MUGO KAGWIMI....1<sup>ST</sup> RESPONDENT

ISAAC MURIUKI MUGO.....2<sup>ND</sup> RESPONDENT

JAMES KARIUKI MUGO.....3<sup>RD</sup> RESPONDENT

JOSEPH WANJOHI GATEGA.....4<sup>TH</sup> RESPONDENT

PETER MUCHOKI WAHOME.....5<sup>TH</sup> RESPONDENT

WILFRED MWAI GITHINJI.....6<sup>TH</sup> RESPONDENT

**RULING**

1. The applicants filed an application dated 03/07/2017 seeking the following orders;

(i) Pending hearing of the application, the Honourable Court be pleased to order stay of the execution of costs before the Deputy Registrar.

(ii) The Honourable Court be pleased to declare the whole process of assessment of costs and execution before the Deputy Registrar as illegal/null and void ab initio.

**2. Applicants' case**

They claim that through an oversight the application dated 19/11/2014 was filed in **Succession Cause No. 14 of 2014** and not **Succession Cause No. 268 of 2014**. The application was later withdrawn with costs to the respondents. The respondents proceeded to file bill of costs dated 07/04/2015 in **Succession Cause No. 268 of 2014**. During assessment, they filed preliminary objection and the Deputy Registrar in her ruling dated 05/05/2017 observed that there was an oversight in the taxation and advised a reference be filed. That the 5<sup>th</sup> respondent has fixed a date for notice to show cause hence the need to grant the stay orders.

### 3. 5<sup>th</sup> Respondent's case

He filed grounds of objection stating that the application contravenes the legal provisions of the Advocates Act. That the applicants have failed to disclose that they had filed two similar applications in different court files which led to the striking out with costs in one matter.

### 4. Preliminary objection dated 19/07/2016

They were filed on grounds that the application was filed under **Succession Cause No. 14 of 2014** and not **Succession Cause No. 268 of 2014**. That costs were wrongly assessed in **Succession Cause No. 268 of 2014** while no such application was filed therein. That the costs granted were only for the application dated 19/11/2014 in **Succession Cause No. 14 of 2014** and not the entire cause in **Succession Cause No. 268 of 2014**.

5. The parties proceeded by way of Written Submissions. The applicant submits that the assessment of costs could not be done on an entirely different file, taking cognizance of the fact that the same was assessment of the whole matter. That orders of notice to show cause arising from the taxation are an illegality.

6. For the respondent it was submitted that no objection was filed within 14 days as provided under Rule 11(1) of the Advocates (Remuneration) Order and there was nothing to stop the 5<sup>th</sup> respondent from executing the costs awarded.

7. I have considered the application.

#### Issue arising;

**Order 50 Rule 13(2) currently Order 51, rule 11 of the Civil Procedure Rules** provides:

*Unless the court otherwise orders for special reasons to be recorded, costs awarded upon an originating summons, motion chamber summons or other process shall be taxed only at the conclusion of the suit.*

I have looked at some persuasive decisions on the subject.

#### **Stone Kathuli Muinde V Katelembo Athiani Muvuti Farmers And Ranching Co-Operative Society [2004] eKLR**

The Court held;

**May be a bill could have been filed based on the application and even so the court would need to have been given reasons as to why the respondent could not wait for the suit to be determined before a bill could be drawn for taxation based on the application. Order 50 Rule 13(2) provides that unless the court otherwise orders, for special reasons to be recorded, costs awarded upon chamber summons, Notice of motion or other process shall be taxed only at the conclusion of the suit. The taxation of the bill was premature and irregular.....**

**For the above reasons, it is hereby ordered that there be stay of execution and the taxing officer's decision be and is hereby set aside and the bill is ordered remitted back to the Deputy Registrar to tax afresh only after the arbitrators award is made judgement of this court and all procedures complied with as by law provided.**

#### **Francis Mulama Otuma & another; v Jonatham Angote & 4 others [2016] eKLR**

The Court held;

**Further, Section 49 (d) of the Advocates Act Cap 16 Laws of Kenya requires that 5<sup>th</sup> Respondent in this matter seeks directions of the Court as to whether his bill of costs should be taxed by the taxing officer before the suit is determined. There is no evidence on record that such directions have been sought by the 5<sup>th</sup> Respondent or by any other party. In the circumstances, I find and hold that it is premature for the 5<sup>th</sup> Respondent to insist on taxing the bill of costs before such directions are taken.**

#### **Jatco Transporters & Tours Agency Ltd & another v Jason Njiru Kithinji & 4 others [2005] eKLR**

The Court held;

**In my considered opinion, the 5th Defendant was right. Whilst acknowledging that the said Ruling was in respect of a Chamber Summons, I nonetheless note that it was an order which brought to an end the Plaintiff's claim against the 5th Defendant. The Judge not only allowed the Chamber Summons simpliciter, he also dismissed the Amended Plaintiff. Prior to the amendment of the Plaintiff, the 5th Defendant had not been a party to these proceedings. Therefore, once the Amended Plaintiff, by which he had been made a party was dismissed, that brought to an end the claim against the 5th Defendant. In that sense, although the Ruling was in respect of a Chamber Summons, it also concluded the suit, as against the 5th Defendant. Therefore, in my considered view the 5th Defendant thereby became entitled to have its Bill of Costs taxed.....**

**Therefore, doing the best I can in the circumstances, I hold that the best way to do justice to the parties herein is to grant a**

stay of execution pending the determination of the objection which the Plaintiffs have taken against the taxation. However, the said stay shall only take effect if the Plaintiffs will have deposited, as security, the sum of Kshs.300,000/=. The said deposit can either be paid into court, or alternatively be held in a joint interest-earning account, held jointly by the advocates for the Plaintiffs and the 5th Defendant.

There are two cases involved herein as follows;

**1. Misc. Succession Cause No. 14 of 2014 Stephen Muchita Mugo Kagwimi V Sophia Karuana Karani & 4 others**

Summons for revocation of grant was filed on 17/04/2014.

**2. Sophia Karuana Karani & 4 others V Stephen Muchita Mugo Kagwimi & 5 others**

Summons for revocation of grant was filed on 17/04/2014.

**8. Summary**

The initial case was **Succession Cause No. 314 of 2007** whereby certificate of confirmation of grant of the estate of Kigwimi Gatega was issued to Stephen Muchita Mugo Kagwimi on 12/09/2008.

**9.** Summons for revocation of grant was filed under **Misc. Succession Cause No. 14 of 2014** whereby on 06/05/2017 the court stated that the summons be amended as follows; **Sophia Karuana Karani & 4 others V Stephen Muchita Mugo Kagwimi** and applicants to effect service on the respondent. Thereafter no other information of document is available on the said folder.

**10.** However, under **Succession Cause No. 268 of 2014** there are documents filed in respect of **Misc. Succession Cause No. 14 of 2014** including the application for prohibitory orders and the order issued therein on 11/03/2015.

**11.** Thereafter the certificate of costs were filed bearing the case no. **Succession Cause No. 268 of 2014**.

**12.** It therefore seems two files were opened in respect of the same cause of action and there arose the confusion. However the issue is in respect of revocation of grant issued under **Succession Cause No. 314 of 2007**. Therefore in view of the above case, since the matter is yet to be heard and determined, the taxation was premature. The costs were awarded for an application which was withdrawn due to misfiling. No special reasons were given to tax the bill before the conclusion of the suit. It was irregular to tax the bill and seek its execution. For these reasons I order as follows:-

- 1) The application has merits.
- 2) The whole process of assessment of costs and execution was irregular and is therefore set aside.
- 3) Costs shall be assessed at the conclusion of the succession cause No. 268/2014 which is pending determination of an application for revocation of grant.
- 4) Each party to bear its own costs.

**Dated at Kerugoya this 14<sup>th</sup> day of February 2019.**

**L. W. GITARI**

**JUDGE**