

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MILIMANI LAW COURTS
ARB NO. E006 OF 2021

**TREAT OF THE DAY (EA)
LIMITED.....APPLICANT**

-VS-

**UTILITY TRADING LIMITED.....
RESPONDENT**

**CONSOLIDATED WITH
MISC APPL E160 OF 2021**

**UTILITY TRADING LIMITED/ UTILITY GROUP
KENYA LIMITED.....
.....APPLICANT**

VERSUS

**TREAT OF THE DAY (EA) LIMITED/ TREAT OF
THE DAY LLC.....
.....RESPONDENT**

RULING

- 1.The respondent, **Utility Trading Limited**, filed the notice of motion dated 18.12.2024 brought primarily under **Order 22 Rule 35(b) the Civil Procedure Rules**.

- 2.The respondent seeks an order to summon the applicant's present and past directors for their examination as to the judgment debtor's assets and to produce all its books of account.

3.It also seeks that in case of non-compliance, the applicant's corporate veil be lifted and the directors be held personally liable for the amount due under the certificate of costs herein.

4.The application is premised on the grounds set out on its face and the affidavit sworn by **Bernard Sitati** on 18.12.2024.

5.The grounds are as follows: -

(1) the respondent's party & party bill of costs dated 27.11.2023 was taxed at Kshs. 867,077/- against the applicant on 15.10.2024.

(2) The applicant's directors are **Brian Otieno** and **Clifton Pius Jura**.

(3) The applicant's conduct has been dishonest and mala-fides portending that the corporate personality is being used to escape liability. Corporate veil is not a cure of the director's ills, misdeed and defaults.

(4) Thus, they find it prudent that the directors be cross-examined to enable the respondent trace the assets of the company.

(5) The continued delay in satisfaction of the certificate of taxation hinders the respondent's enjoyment of the fruits of the certificate of taxation which amounts to delayed justice that is against the law.

(6) It is in the interest of substantive justice that this application be allowed to enable the respondent to execute against the applicant's directors personally.

6.The respondent served the application on 8.10.2025. Despite service, there was no response by the applicant.

Analysis and Determination

7.The issues for determination are whether the applicant's directors ought to be summoned for oral examination in respect to the company's ability or means to satisfy the decree, and whether the applicant's veil of incorporation should be lifted and directors held liable.

8.Under **Order 22 Rule 35(b) and (c) of the Civil Procedure Rules** the court may order the examination of an officer of a judgment-debtor company in court to provide answers in respect to

the company's ability or means to satisfy the *decree*.

9.I note from the record that through the taxation ruling dated 14.10.2024, the respondent's party and party bill of costs dated 27.11.2023 was taxed at Kshs. 867,077/-.

10.A certificate of taxation dated 26.11.2024 was issued.

11.The subject of the bill of costs were instructions issued by the respondent to file and prosecute its application for recognition and enforcement of an arbitral award issued on 2.2.2021 and to defend the respondent in relation to the applicant's application for setting aside the award.

12.Through the ruling dated 13.7.2021, **Hon. Mativo J.** (as he then was) dismissed the application for setting aside the award and allowed the respondent's application for recognition and enforcement of the award. The court also ordered the applicant to pay the costs of the two applications to the respondent.

13.A decree was issued on 3.8.2021 for Kshs. 7,923,107/- with interest thereon at 12% from the date of the award until payment in full.

14.The respondent lodged an application for execution of the decree dated 11.5.2022 seeking Kshs. 9,132,155.84/- comprising the principal amount, interest thereon, further court fees and collection fees.

15.Warrant of attachment of movable property in execution of decree for money was issued on 11.5.2022.

16.It was thereafter that the respondent filed its party and party bill of costs dated 27.11.2023 which was taxed at Kshs. 867,077/-.

17.The respondent based the application under consideration on the ground that the applicant has failed to settle the taxed costs.

18.It is manifest that the costs were not stated in the decree issued on 3.8.2021. The costs were taxed after the decree had been issued.

19.The respondent exhibited the certificate of costs. However, I have not seen an application for the

entry of judgment in terms of the certificate of costs in the file.

20. Order 21 Rule 9 (2) of the Civil Procedure

Rules provides that: -

“9. Costs [Order 21, rule 9]

(2) In all other cases, and where the costs have not in fact been stated in the decree or order in accordance with subrule (1), after the amount of the costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or, in a subordinate court, by the magistrate. ...”

21. The party and party costs have been stated in the Certificate of costs signed by the taxing master. But, as cross-examination of directors is in execution of a decree, the costs be expressed in a decree in this case for purposes of execution.

22. I am acutely aware of strong views that, party and party costs should be expressed in a decree in the suit in which they were granted; and others that, if such costs are taxed after the decree and stated in a certificate of costs, should be executed upon judgement on the certificate of costs. It is

ordinance that, party and party costs are awarded in the suit.

23. That notwithstanding, the costs have not been paid by the company and in the circumstances of this case, it is prudent to call upon the directors of the company to be cross-examined on the assets of the company or means for satisfying the decree as well as produce books of accounts. The order as well as the decree to be served upon the directors.

Disposal

24. In the upshot, the respondent's notice of motion dated 18.12.2024 is allowed subject to clause 23 above.

**Dated, signed and delivered at Nairobi through
Microsoft Teams online application this 5th day
March, 2026**

F. Gikonyo M

Judge

In the presence of: -

Owino for Respondent

Oluoch for Applicant

CA - Ivan/Aggrey