



Coffee Board of Kenya v Kiambu County Council & another (Civil Appeal 232 of 2015) [2023] KECA 519 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 519 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 232 OF 2015
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
MAY 12, 2023**

BETWEEN

COFFEE BOARD OF KENYA PLAINTIFF

AND

KIAMBU COUNTY COUNCIL 1ST RESPONDENT

**MARGARET NYOKABI MBUGUA AS ADMINISTRATRIX OF THE ESTATE
OF THE LATE SAMUEL MBUGUA KIBATHI THE CHAIRMAN, KIAMBU
COFFEE CESS 2ND RESPONDENT**

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (M. G. Mugo, J.) dated 29th July 2010 and delivered on 9th September 2010 in H.C.C.C Suit No. 186 of 2000)

JUDGMENT

1. The 1st respondent, the now defunct Kiambu County Council (the Council), sued the appellant, Coffee Board of Kenya (the Board), and the late Samuel Mbugua Kibathi (the then Chairman of Kiambu Coffee Cess - KICOCE) in the High Court of Kenya at Nairobi in HCCC No. 186 of 2000 seeking as against the appellant and the 2nd respondent jointly and severally: a declaration that the 1st respondent, and not the 2nd respondent is the only lawful authority entitled to receive cess from the appellant; an account of all the moneys collected by the appellant for the period between 1997 and January 2000; an order directing the appellant to release all the moneys found due and owing to the 1st respondent; costs of the suit and interest; any other relief the court may deem merited and just to grant.
2. The 1st respondent's case was that, as the Local Authority with jurisdiction over the then Kiambu District, was empowered by the provisions of the *Agriculture Act* (cap. 318) (now repealed) to receive crop cess and, in particular, cess from the proceeds of sale of coffee in its jurisdiction. According to the



- 1st respondent, the appellant was required to remit to it 1% of all proceeds from the sale of coffee during the period between 1997 and January 2000, all amounting to USD 15,673.06 quarterly.
3. The 1st respondent contended that, during the period between 1997 and January 2000, the appellant unlawfully and without any justifiable cause remitted the amount aforesaid to the 2nd respondent thereby denying the 1st respondent its statutory revenue base in consequence of which it has not been able to meet its statutory obligations.
 4. We take note of the fact that Samuel Mbugua Kibathi (Deceased) was sued in his capacity as the then Chairman of KICOCE and not in his private capacity. That notwithstanding, following his demise, the appellant successfully applied for joinder of the personal representative of his estate, Margaret Nyokabi Mbugua, as party in the appeal herein.
 5. In paragraph 3 of its plaint dated 3rd February 2000, the 1st respondent described the 2nd respondent as "... Chairman of Kiambu Coffee Cess and is sued on behalf of the Board of the said Committee." It is also noteworthy that none of the other members of the Committee was sued, and neither was any subsequent amendment made to the plaint or defence to reflect KICOCE Limited as the 2nd respondent after its formal registration as a private company.
 6. In their joint defence dated 3rd March 2000, the appellant and the 2nd respondent contended, inter alia: that the 1st respondent was not entitled to receive crop cess; that, following a Presidential Directive issued on or about 6th December 1996, coffee farmers in Kiambu had the right to take control of the utilisation of coffee cess collected by the appellant; that, to this end, the appellant, in consultation with the farmers, set up a committee, which was subsequently registered as a private company in the name and style of KICOCE Limited chaired by the deceased 2nd respondent; that the appellant set up various District Road Infrastructure for the purposes of repairing and maintaining the access road infrastructure; that, under and by virtue of Legal Notice No. 120 of 1998 published by the then Minister for Local Authorities, the 1st respondent was required to comply with the Local Government (Crop Cess Monitoring Committee) Regulations, 1998, which mandated local authorities levying a crop cess to establish a committee known as "The Crop Cess Monitoring Committee" for the purpose of maintenance and repair of access roads; that the 1st respondent refused or neglected to comply with the said notice; that the appellant and the 2nd respondent were "unable" to release the funds in issue to the 1st respondent in view of the 2nd respondent's Judicial Review application challenging the Minister's decision in the legal notice aforesaid, and upon which an order was issued staying the Minister's decision on 23rd October 1998 pending hearing and determination of the Judicial Review application; and that the court order remains unchallenged and in force to this day. They urged the trial court to dismiss the 1st respondent's suit with costs.
 7. In the judgment of M. G. Mugo, J. dated 29th July 2010 and delivered by Rawal, J. on 9th September 2010, the High Court allowed the 1st respondent's suit with costs to the 1st respondent. The learned Judge declared that the 1st respondent, and not the 2nd respondent, was the only lawful authority entitled to receive cess from the appellant. The trial court also ordered the appellant to account for and release to the 1st respondent all moneys collected between 1997 and January 2000 together with interest thereon at court rates from the date of filing suit until payment in full. In her judgment, the learned Judge held that the sums held in the escrow account were so held on behalf of the 1st respondent. She directed that the same be released to the 1st respondent with immediate effect together with interest accrued thereon.
 8. Aggrieved by the decision of Mugo, J., the appellant moved to this Court on appeal on 9 grounds, which we need not replicate here. Suffice it to observe that the same go against the grain of rule 88 of this



Court's Rules, which requires grounds of appeal to be concisely set out without argument or narrative. In the circumstances, we take the liberty to summarise and reframe them as hereunder, namely, that the learned Judge erred in law and in fact: by finding and holding that the Presidential Directive aforesaid was illegal, unenforceable, and ultra vires, and that, by complying with the Directive, the appellant acted in breach of the law; by finding that the 1st respondent had at all material times complied with the by-laws on crop cess entailed in *Legal Notice No. 120 of 1988*; by misapprehending and disregarding the evidence as tendered; by ordering an account and payment to the 1st respondent of moneys already utilised in the development, repair, maintenance, and improvement of the physical access infrastructure in the 1st respondent's jurisdiction; in failing to appreciate that payment of the moneys aforesaid would amount to unjust enrichment of the 1st respondent; and by applying *Legal Notice No. 2693 of 2003* retroactively in favour of the 1st respondent.

9. Urging us to allow the appeal, the appellant prays: that the judgment of the High Court (Mugo, J.) be set aside and substituted for an order striking out the 1st respondent's suit in the trial court; and that costs of the appeal and in the High Court be borne by the 1st respondent.
10. In support of the appeal, learned counsel for the appellant, M/s. Adera & Company, filed written submissions dated 19th April 2021 highlighting the historical background of the suit, and the evidential material before the trial court leading to the impugned judgment. However, he has not cited any judicial authorities for our consideration.
11. On her part, the 2nd respondent took no position in the appeal. She urged us to strike out her name from the proceedings.
12. Opposing the appeal, learned counsel for the 1st respondent, M/s. Karuru Mwaura & Company, filed their written submissions and list of authorities dated 27th November 2020 citing the decision of the High Court at Mombasa in *William Odhiambo Ramogi & 2 Others v the Attorney- General & 5 Others* [2018] eKLR, submitting that, by giving a verbal directive on the use of coffee cess, the President acted in contravention of section 192A of the *Agriculture Act* (cap. 318) (Repealed).
13. This being a first appeal, it is this Court's duty, in addition to considering submissions by the appellant and the respondents, to analyze and re-assess the report and other evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.
14. In *Selle's case (ibid)*, the Court held that:

“An appeal to this Court from a trial by the High Court (as well as the ELRC) is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions....”
15. Having examined the record of appeal and the grounds on which it is founded, the impugned judgment, the written and oral submissions of learned counsel for the appellant and learned counsel for the respondents, statute law and cited authorities, we are of the considered view that the appeal from the impugned judgment stands or falls on our findings on the following main issues of law and fact in respect of which learned counsel for the parties submitted, namely: whether the 2nd respondent is properly joined as party to the appeal herein; who as between the 1st respondent and KICOCE was at all material times entitled to receive from the appellant coffee cess in the 1st respondent's jurisdiction; whether *Legal Notice No. 120 of 1998* took effect so as to mandate the appellant and the 2nd respondent



- to apply the receivable coffee cess in the intended infrastructural projects; whether the 1st respondent was entitled to recover from the appellant and the 2nd respondent the sums claimed in the plaint or any part thereof; whether the appellant and KICOCE are obligated to render an account of the sums claimed; and what orders ought we to make in determination of this appeal, including orders on costs.
16. On the 1st issue, it is common ground that the 2nd respondent, Samuel Mbugua Kibathi (Deceased), was sued in his capacity as the then Chairman of KICOCE, and not in his private capacity. We take to mind the fact that, having been sued in his official capacity and described in paragraph 3 of the plaint as sued on behalf of the Board of the said Committee, the representative of the estate of the deceased 2nd respondent is not properly joined in the proceedings herein. Moreover, the record as put to us does not disclose any claim made or relief sought against the deceased's estate. Accordingly, the administratrix of the deceased's estate, Margaret Nyokabi Mbugua, is hereby struck out with costs as against the appellant.
17. On the 2nd issue as to who, as between the 1st respondent and KICOCE, was at all material times entitled to receive from the appellant coffee cess in the 1st respondent's jurisdiction, the appellant relies on section 192A of the repealed *Act*, which allowed a Local Authority, in consultation with the Minister, to impose a crop cess. According to the appellant, the *Act* required the local authority to promulgate by-laws for that purpose. Section 192A(1) of the repealed *Act* reads:
- 192A. Agricultural cesses
1. Subject to subsection (1A), local authority may, with the consent of the Minister given after consultation with the Minister for the time being responsible for Local Government, by by-laws, impose a cess on any kind of agricultural produce, and may in the by-laws make such incidental provision as is necessary or expedient; and the cess shall form part of the local authority's revenues.
18. The appellant's case was that, as a State Corporation, they were bound by such executive directions as were given by the President on 6th December 1996 requiring the appellant, in conjunction with farmers, to form Cess Committees throughout the Republic for control of crop cess moneys. This prompted the formation of KICOCE and the subsequent disbursements, the subject of the suit in the High Court leading to the impugned judgment. The appellant submits that KICOCE was therefore entitled to receive the coffee cess moneys to finance the intended development, repair and maintenance of access roads in Kiambu.
19. The 1st respondent's position is that it was the rightful recipient of the coffee cess moneys in issue. According to the Council, by a *Legal Notice No. 202 of 1988* issued pursuant to section 192A of the Act, the Minister for Local Government, with the consent of the Minister for Agriculture, gazetted the adoptive by-laws, which any Municipal Town or County Council, such as the 1st respondent, may adopt; that the notice entitled the 1st respondent to receive coffee cess from the appellant; that the appellant remitted coffee cess to the 1st respondent equivalent to 1% of all the proceeds of coffee grown within its jurisdiction until 1998 when the Minister for Local Government issued *Legal Notice No. 120 of 1998*.
20. Paragraph 2 of the 1998 Legal Notice makes provision for the establishment of Crop Cess Monitoring Committees for the maintenance and repair of access roads. Paragraph 3 provides for the composition of the said committees to include councillors and representatives of farmers nominated by registered farmers organisations within the jurisdiction of the Local Authority. The notice also made provision for the maintenance of bank accounts to facilitate deposits of crop cess collected (paragraph 4), signatories thereto (paragraph 5), approval of payments thereout on account of repair and maintenance



- of access roads (paragraphs 6 and 7), budgetary allocations and returns on income and expenditure (paragraphs 8 and 9), and payment of sitting allowances to non-council members (paragraph 10).
21. The 1st respondent contends that the appellant and the 2nd respondent failed to establish the requisite committee and open crop cess accounts as mandated under the 1998 Legal Notice and that, instead, the appellant proceeded to remit moneys receivable by the 1st respondent to KICOCE. According to the 1st respondent, the act of the appellant and the 2nd respondent amounted to “... pilferage, looting, grand larceny or gangland annexation of public resources into private hands”. Those are strong words that should rarely feature in pleadings before judicial institutions where our professional tools of trade are, of necessity, tempered by utmost courtesy, sobriety and respect for all regardless of their office or status in society.
 22. In a sharp turn of events, the 2nd respondent filed a Judicial Review application in HC Misc. App. No. 1158 of 1998 seeking revocation and annulment of *Legal Notice No. 120 of 1998*, whose status is not clear from the record as put to us. Suffice it to observe that the leave to file the Judicial Review application operated as stay of the implementation of the provisions of the 1998 Legal Notice with effect from 22nd October 1998.
 23. To our mind, the stay orders of 22nd October 1998 arresting the implementation of Legal Notice No. 120 of 1998 stood in the way of the intended establishment of the Committees and the opening of coffee cess collection accounts pursuant to the Notice. What compounds the situation is that we find nothing on record to show that the 1st respondent adopted the Local Government (Agricultural Produce Cess) (Adoptive By-Laws) Order, 1988, pursuant to section 192A(1) of the repealed Act. In the circumstances, it remained the 1st respondent’s prerogative to establish appropriate administrative and regulatory frameworks to facilitate collection and application of crop cess, including the coffee cess in issue. In conclusion, it is the 1st and not the 2nd respondent that was entitled to receive coffee cess from the appellant for the period, and in the amounts claimed in the trial court.
 24. That brings us to the 3rd issue as to whether *Legal Notice No. 120 of 1998* was legally enforceable so as to mandate the appellant and the 2nd respondent to apply the receivable coffee cess in the intended infrastructural projects. The appellant’s case was that the notice took effect, and that the cess moneys in issue were all expended towards repairs, refurbishment, construction and maintenance of access roads, and on matters incidental thereto.
 25. Supporting the position taken by the appellant, the 2nd respondent contended that the cess moneys paid to the Committee (KICOCE) pursuant to the legal notice was used to repair all access roads within the Kiambu District; and that KICOCE purchased certain machinery and materials for the execution of the repair and maintenance works. In support of their position, the 2nd respondent produced its Financial Statements for the period between 1997 to 2004 prepared by M/s. Githiga Mwangi & Associates (Certified Public Accountants), and dated 4th November 2005.
 26. According to KICOCE, coffee cess received amounted to KShs. 95,337,598 (excluding other incomes) during the period between 1997 and the year 2001. Out of that amount plus other receivables, including fixed deposit interest income, the sum of KShs. 100,352,396 was expended on the infrastructural projects aforesaid. It is noteworthy, though, that the accountants did not testify at the trial, and neither was the value of the related machinery accounted for or ascertained.
 27. First, we find nothing on record to suggest that the inaugural Committee that was subsequently incorporated into KICOCE was established strictly in compliance with the 1998 Notice. Secondly, we are not told whether the bank accounts contemplated in the Notice were established or, if established, who were signatories thereto. Thirdly, it is not clear from the record whether the accounts presented



by KICOCE provided sufficient proof of all sums received on account of coffee cess and applied in the alleged works, particularly in relation to the machinery said to have been secured for the repair and maintenance of the access road infrastructure.

28. Be that as it may, it is instructive to note that the sums claimed were allegedly expended during the period between the year 1997 and January 2000. Leave granted to the 2nd respondent to file its Judicial Review application on 22nd October 1998 in HC Misc. App. No. 1158 of 1998 seeking revocation and annulment of *Legal Notice No. 120 of 1998* effectively stayed implementation of the 1998 legal notice. Coupled with the absence of the appropriate administrative framework, including a properly constituted Committee and the banking arrangements required under the Notice, orders of the trial court staying implementation of *Legal Notice No. 120 of 1998* rendered that Notice unenforceable at law. In the circumstances, the appellant and the 2nd respondent had no mandate to apply the coffee cess receivable by the 1st respondent in the intended infrastructural projects.
29. On the 4th issue as to whether the 1st respondent was entitled to recover from the appellant and the 2nd respondent the sums claimed in the trial court, we hasten to observe that recovery by the 1st respondent of the sums claimed or any part thereof depends on whether the same were in fact applied for the intended purpose. To hold otherwise would unduly prejudice the appellant and KICOCE. In effect, it would be unjust to order payment by the appellant and KICOCE to the 1st respondent of moneys already applied in the intended development, repair and maintenance of road infrastructure in the District in circumstances that call for presumption of a resulting or constructive trust between the 1st respondent, the appellant and KICOCE.
30. In *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR, this Court dealt with the issue of trust at length. The Court made reference to *Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR and re-stated the law on trusts as follows:

“According to the *Black’s Law Dictionary*, 9th Edition; a trust is defined as

1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).

Under the *Trustee Act*, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories: constructive and resulting trusts.... A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing.

... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the



benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”

31. In *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR, this Court stated that:
- “The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”
32. As Lord Bridge observed in *Llyods Bank Plc v Rosset* (1991)1 AC 107 at p.132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant.”
33. In our considered view, the circumstances of this case lead to the construction of a trust as the most appropriate remedy. Having found that the 1st respondent, and not the appellant or KICOCE, was entitled to collect coffee cess in its jurisdiction; that the implementation of *Legal Notice No. 120 of 1998* had been stayed by an order of the trial court on 22nd October 1998; that, when previously in force, the appellant and KICOCE failed to establish the requisite committee and put in place appropriate administrative and regulatory mechanisms in compliance with the Legal Notice; and that the two nonetheless applied cess moneys receivable by the 1st respondent in the intended development, repair and maintenance of access road infrastructure, we can only conclude that this is a case of absolute necessity (see *Peter Ndungu Njenga v Sophia Watiri Ndungu*) that a resulting or constructive trust be presumed so as to constitute the appellant and KICOCE trustees for the 1st respondent in relation to the moneys collected and expended during the period between 1997 and January 2000. To this end, the appellant and KICOCE are obligated to render an account of the coffee cess receivable during that period. That settles the 4th and 5th issues.
34. Having carefully considered the record of appeal, the impugned judgment, the rival written and oral submissions of learned counsel, and the cited authorities, we find that the appeal partially succeeds. Accordingly, we hereby order and direct that:
- a. The name of Margaret Nyokabi Mbugua, the administratrix of the estate of the late Samuel Mbugua Kibathis be and is hereby struck out of the proceedings herein;
 - b. The judgment and decree of the High Court of Kenya at Nairobi (M. G. Mugo, J.) dated 29th July 2010 and delivered on 9th September 2010 in HCC Suit No. 186 of 2000 is hereby set aside with no orders on costs;
 - c. The matter be remitted to the High Court for taking of an account as between the appellant, KICOCE and the 1st respondent, and any amounts found due and payable to the 1st respondent be paid by the appellant;
 - d. Margaret Nyokabi Mbugua’s costs in the appeal be borne by the appellant.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL



H. OMONDI

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

