



**Thika Coffee Mills Limited v Mikiki Farmers Co-operatives Society Limited & another  
(Civil Application 242 of 2008) [2020] KECA 1 (KLR) (5 December 2020) (Ruling)**

Neutral citation: [2020] KECA 1 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 242 OF 2008  
KI LAIBUTA, JA  
DECEMBER 5, 2020**

**BETWEEN**

**THIKA COFFEE MILLS LIMITED ..... APPLICANT**

**AND**

**MIKIKI FARMERS CO-OPERATIVES SOCIETY LIMITED ... 1<sup>ST</sup> RESPONDENT**

**COFFEE BOARD OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution from the Judgment and Decree of the High Court of Kenya at Embu (J. N. Khaminwa, J) dated 30th April, 2008) in H.C.C.C. No. 28 of 2006)*

**RULING**

1. The 2<sup>nd</sup> respondent being dissatisfied with the Ruling of the Hon. Deputy Registrar (A. Nyoike) dated 7<sup>th</sup> February 2019 striking out the applicant's party-to-party Bill of Costs dated 4<sup>th</sup> April 2017 preferred a reference to this Court under Rule 112 (1) and (3) of the Rules of this Court. Vide their letter of 14<sup>th</sup> February 2019, M/s. Adera & Co., Advocates for the 2<sup>nd</sup> respondent, advanced 6 grounds in support of the Reference, and which may be summarised and reframed as below. According to learned counsel –
  - (a) the taxing officer erred in law by mistakenly holding that the Bill of Costs in issue was not properly before this Court and thereby erroneously declining to assume and exercise the jurisdiction vested in her by Rule 111(1) and (2) of this Court's Rules;
  - (b) the Deputy Registrar erred in finding that an Order for Costs had not been given in the substantive appeal notwithstanding the Court's judgment given on 26<sup>th</sup> June 2013 whereby the applicant was ordered to pay to the 2<sup>nd</sup> respondents costs of the appeal;
  - (c) the taxing officer misconstrued the parties' consent order on record endorsed on 5<sup>th</sup> November 2008 leading to the conclusion that the costs that were to be taxed were costs in the superior court;



- (d) the applicant concedes liability in costs to the 2<sup>nd</sup> respondent, and the parties to the taxation were in agreement that the subject Bill of Costs was due and properly before the Court; and
- (e) unless the orders sought are not granted, the 2<sup>nd</sup> respondent stands to suffer an injustice by denial of restitution and recovery of appropriate costs adjudged as payable to it.
2. On those grounds, the 2<sup>nd</sup> respondent prays inter alia that –
- (i) the decision of the Hon. Taxing Officer delivered on 7<sup>th</sup> February 2019 in respect of the 2<sup>nd</sup> respondent’s Party-and-Party Bill of Costs dated 4<sup>th</sup> April 2017 be set aside;
- (ii) the Bill of Costs be taxed on merits; and
- (ii) the costs of this Reference be paid by the appellant to the 2<sup>nd</sup> respondent.
3. I find nothing on record to suggest that this Reference is opposed. Having considered the 2<sup>nd</sup> respondent’s Reference and the written submissions of its learned counsel, I find that only one main issue falls to be determined – whether the 2<sup>nd</sup> respondent’s Party-to-Party Bill of Costs dated 4<sup>th</sup> April 2017 is properly before this Court.
3. Paragraphs 4 and 5 of the consent order given on 5<sup>th</sup> November 2008 and issued on 26<sup>th</sup> January 2017 in Civil Application No. 242 of 2008 read:
- “4. That without prejudice to the applicant’s appeal and applicant’s right to restitution should the appeal succeed, the applicant do pay the 2<sup>nd</sup> respondent taxed costs in the superior court.
5. That costs of this application do abide the outcome of the intended appeal.”
5. There is no difficulty in understanding that the application referred to in paragraph 5 of the consent order is the appellant’s application for stay of execution of the judgment and decree of the superior court pending the then intended appeal. With regard to the costs of that application, the parties’ intention as expressed in their consent order was that “... costs of this application do abide the outcome of the intended appeal” Those costs were, for all intents and purposes, recoverable in this Court. So are costs of the substantive appeal awarded to the 2<sup>nd</sup> respondent. Such costs may be agreed or, failing agreement, taxed pursuant to Rule 111(1) and (2) of this Court’s Rules.
6. Having perused the 2<sup>nd</sup> respondent’s Bill of Costs dated 4<sup>th</sup> April 2017, I find that all the items contained in the Bill relate to the application to this Court for stay of execution of the judgment and decree of the superior court pending appeal pursuant to Rule 5(2) (b). Accordingly, I find that the 2<sup>nd</sup> respondent’s Bill of Costs is properly before this Court.
7. That leaves me with the parties’ intention expressed in paragraph 4 of the consent order with regard to “... taxed costs in the superior court”. Recovery by the 2<sup>nd</sup> respondent of the “taxed” costs in the superior court was “without prejudice to the applicant’s appeal and applicant’s right to restitution should the appeal succeed”. I hasten to observe that there appears to be no contention as respects costs in the superior court, which had presumably been taxed by the time the parties went on appeal. Accordingly, no issue arises on this score.
8. In view of the foregoing, I hereby order and direct that:
- (a) the Ruling and Order of the Hon. Deputy Registrar (A. Nyoike) given on 7<sup>th</sup> February 2017 be and is hereby set aside;
- (b) the 2<sup>nd</sup> respondent’s Party-and-party Bill of Costs dated 4<sup>th</sup> April 2017 be taxed on merits; and



(c) there be no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

***Signed***

**DEPUTY REGISTRAR**

