REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. APPLI. NO. 157 OF 2014

AND

CIVIL SUIT NO. 14 OF 2017

VINCENT CHOKAA t/a CHOKAA & COMPANY ADVOCATES...APPLICANT

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT

RULING

1. The cause in Kakamega HC Misc. Appli. No. 157 of 2014 is for taxation of an advocate bill of costs as between Vincent Chokaa t/a Chokaa & Company Advocates, hereinafter to be referred to as the applicant, and the County Government of Kakamega, to be known hereinafter as the respondent, in respect of legal services that the applicant had allegedly rendered to the respondent. The matter was compromised by way of a consent that was recorded by the advocates appearing for both sides on 7th July 2015, which was stated by Mr. Imbenzi, who was holding brief for Mr. Ong'anda, for the respondent in the following terms:

> "*By consent all the Bill* (sic) *of Costs in all the 69 matters be taxed as drawn."*

2. Subsequent to that consent, the respondent moved the court by an application dated 17th July 2015 seeking that the consent order recorded on 7th July 2015 be set aside, stay of execution with respect to the said order and that the application by the respondent dated 27th August 2014 be heard and determined by the court. The background to the application is essentially the argument by the respondent that Mr. Imbenzi compromised the matter of taxation without the express instructions of the respondent. It was argued that the respondent was opposed to the taxation, and had filed the application dated 27th August 2014 seeking to have the bills dismissed. When the said application was placed before the taxing officer, Hon. Kendagor, Deputy Registrar, the said officer stated that she did not have the jurisdiction to determine the matter of the dismissal of the bills for the reasons advanced in the application. The application was subsequently placed before the Judge on 16th February 2015, who gave the parties 25th March 2015 as the date for highlighting submissions that the parties had placed on record. Come 25th March 2015, the parties by consent rescheduled the highlighting of the submissions to 7th July 2015. When the matter came up on 7th July 2015, the advocates present recorded the consent that I have referred to in paragraph 1 here above.

3. The application dated 17th July 2015 was placed before the Judge on 22nd July 2015, and directions were given that the same be disposed of by way of written submissions, and the matter was to be mentioned on 1st October 2015 for compliance and further orders. While that application was still pending, and notwithstanding the fact that the said application had a prayer for stay of execution of the orders obtained on 7th July 2015, the respondent filed another application dated 8th September 2015 seeking stay of execution of the consent orders of 7th July 2015. The application dated 8th September 2015 was placed before the Judge on 10th September 2015 and an interim stay order was granted. It was directed that the said application be mentioned on 1st October 2015. Come 1st October 2015, directions were given for filing of further affidavits, and the interim orders extended, but no date was given for the disposal of the two applications. Directions were, however, given on 5th December 2016 for disposal of the application dated 8th September 2016 by way of written submissions. The matter was thereafter fixed for ruling on that application on 16th February 2017. It is not clear from the handwritten record whether a ruling was eventually delivered, but there is on record a typewritten ruling on the said application, signed on an unknown date by Kariuki J, and delivered on 5th April 2017 by Njagi J. The order made in the said ruling was to the effect that the consent judgement of 7th July 2015 was stayed to enable the parties ventilate the application dated 17th July 2015. The stay order was conditional on the respondent depositing 50% of the taxed amount in a joint account with the applicant within 30 days, in default of which execution was to ensue for the entire amount.

4. For avoidance of doubt, the final orders in the ruling delivered on 5th April 2017, stated as follows:

> "*14. I therefore make the following orders;*

15. The applicant shall deposit about 50% of the taxed amount and for avoidance of doubt Kshs. 4.34 million in interest earning account to be opened in joint names of the parties advocate (sic) in a bank in Kakamega within the next 30 days from the date herein.

16. The consent judgment is stayed pending interparte (sic) hearing of notice of motion dated 17/7/2015.

17. in default of No. 1 above, the execution to proceed for recovery of the entire amount taxed."

5. The application dated 17th July 2015 was fixed for hearing on several occasions, and did come up severally, but the same did not proceed for one reason or other. Although orders had been made in 2015 for disposal of the said application by way of written submissions, and such written submissions were filed, when the parties appeared before me on 27th November 2018, they agreed, again by consent, that the said application be disposed by way of written submissions, and a fresh round of written submissions were filed.

6. I find it further curious that , the respondent, rather than disposing of the application dated 17th July 2015 opted to file another, dated 17th July 2017 wherein it sought orders:

a) That there be review or setting aside of the orders made on the 7th of July 2015 as against the defendant;

b) That the proceedings in relation to the defendant herein be rendered invalid, null and void; and

c) That the plaintiff be directed to follow the laid down procedures in recovery of his costs.

7. The proceedings in HCCC No. 14 of 2017 were initiated by the applicant in Kakamega HC Misc. Appli. No. 157 of 2014 against the respondent in that cause, by way of plaint, seeking entry of judgment in terms of the consent order of 7th July 2015 in Kakamega HC Misc. Appli. No. 157 of 2014. The same was filed on 21st June 2017. On 5th July 2017, the applicant filed the application dated 4th July 2017, seeking orders, *inter alia*:

a) That judgment be entered for the plaintiff and against the defendant in the sum of Kshs. 8,791,507.00 in accordance with the Certificate of Taxation Costs filed with the plaint;

b) That the respondent do pay to the plaintiff the said sum together with interests therein at 14% per annum with effect from 4th September 2015 until payment in full; and

c) That costs of the application be borne by the respondent.

8. The said application was placed before Sitati J on 26th July 2017, who directed that the same be disposed of by way of written submissions to be highlighted on 15th October 2017. Nothing happened on 15th October 2017, instead directions were given on 7th November 2018, by Njagi J. The Judge took the view that as the application dated 17th July 2017 in Kakamega HC. Misc. Application No. 157 of 2014 seeks review of orders made on 7th July 2015, it was prudent that the same be disposed of first before that dated 4th July 2017, which seeks entry of judgment, was considered. The court then directed that the parties obtain a date at the registry for the disposal of the application dated 4th July 2017, which I believe was in error for the application to be disposed of as a matter of priority was that dated 17th July 2017.

9. Directions had been given on 26th July 2017, for disposal of the application dated 4th July 2017 by way of written submissions. No such directions were given regarding the disposal of the application dated 17th July 2017, after the directions given on 7th November 2018. The parties complied with the directions given on 26th July 2017 on the application dated 4th July 2017, by filing detailed written submissions setting out their various arguments. Only the defendant filed written submissions in relation to the application dated 17th July 2017.

10. It must be stated in the outset that these two matters should have been brought together a long time ago, to avoid a situation where the court was making orders in two parallel proceedings relating to the same matter. It behooves parties to be open, honest and frank with the court so far as such issues are concerned to avoid wastage of precious judicial time.

11. The matter has been pending for a while. There are several applications whose determination is still outstanding. Submissions have been filed in respect of all of them. I shall accordingly decide on matter in such a way that I determine all the outstanding issues in order to bring the entire dispute to a close.

12. It was the applicant's contention in his affidavit in support of the application sworn on 4th July 2017, *inter alia,* that his firm was instructed by the predecessor of the respondent to undertake certain legal work on their behalf but that the respondent had never paid fees for those legal services. The applicant added that he was forced to file the Bill of Costs for taxation of the legal fees owing to his firm, which was subsequently taxed by the Deputy Registrar of the court in the sum of Kshs. 8,791,507.00. The applicant further averred that the said taxed costs have neither been set aside nor altered by the court and that the respondent is truly and justly indebted to the firm of the applicant.

13. The respondent filed their statement of defence and replying affidavit on 19th July 2017, stating, *inter alia,* that the orders sought by the applicant are not available against the respondent as they are not the legal successors of the defunct Municipal Council of Kakamega against whom the debt accrued and the certificate of costs was issued. The respondent further argues that the liabilities and assets of the defunct municipal council did not automatically pass on to the respondent. The respondent further contended that there was a committee established by Intergovernmental Relations Act, 2012 called the Technical Committee, and, that aforesaid Technical Committee duly took over the

residual functions of the Transitional Authority and it is the committee that was required to finalize the audit and verification of the liabilities of the defunct local authorities and make directions thereof.

14. The respondent had filed an application dated 17th July 2015 in Misc. Application 157 of 2014 seeking that the consent order of 7th July 2015 be set aside or varied pending the hearing and determination of that application. In a ruling dated 5th April 2017, the court ordered *inter alia* that the respondent deposits Kshs. 4.34 million (equivalent to 50% of the taxed amount) to be held in an interest earning account opened in joint names of the parties' advocates in Kakamega within 30 days thereof and that in default of the same, the applicant be at liberty to proceed with execution for recovery of the entire amount taxed.

15. In a further affidavit filed by the applicant in response to the respondent's statement of defence and replying affidavit, the applicant stated, *inter alia,* that the issues raised in the defence of the respondent were now *res judicata* as the taxed amount was already agreed upon by the respondent's advocates and that the respondent was yet to comply with the court's ruling by depositing the said sum of Kshs. 4.34 million. The applicant stated that the respondent had no genuine or real defence to his claim and urged the court to grant the prayer for judgment against the respondent in accordance with the taxed costs.

16. The respondent filed a supplementary affidavit sworn by Moses Sande on 6th September 2017 averring that he was aware of the court's ruling delivered on 5th April 2017, but that the court never determined the issues of the liabilities and debts of the defunct municipal council and whether the respondent is a successor to the defunct municipal council of Kakamega. The respondent further averred that the consent order was stayed by the court pending *inter-parties* hearing of their application dated 17th July 2015, and thus the said application is *sub judice* and not *res judicata*.

17. As stated before, and was submitted by the applicant, this suit is for the recovery of the taxed costs as the respondent had failed to deposit half the costs as was ordered by the court. A look at the court's ruling dated 5th April 2017 shows that the respondent was to deposit 50% of the taxed amount, which the court worked out at Kshs. 4, 340, 000.00, in an interest earning account, which was to be opened in joint names of the parties' advocates in a bank at Kakamega within the next 30 days from the ruling date. The ruling goes on to state that should the respondent fail to deposit the said amount "the execution to proceed for recovery of the entire amount taxed."

18. The respondent has not denied that it has failed to comply with the aforementioned orders of the court, and that there is no appeal that set aside or varied the said orders of the court, meaning that the said orders are yet to be discharged by the respondent. It is the failure by the respondent to comply with the court's orders of 5th April 2017 in Kakamega HC. Misc. Application No. 157 of 2014 that prompted the applicant to file the plaint dated 24th May 2017, on 21st June 2017, seeking, *inter alia*, judgment against the respondent for the sum of Kshs. 8,791,507.00, and, thereafter, the instant application dated 4th July 2017, seeking summary judgment.

19. It should not be lost that there was a consent judgment, which was entered into between the parties herein on 7th July 2015, which was stayed by the court in the said ruling of 5th April 2017, at the instance of the respondent, pending hearing and determination of their application dated 17th July 2015. The court allowed the application conditionally to enable the parties ventilate the application dated 17th July 2015. Curiously, the respondent filed the application dated 17th July 2017 which is a mirror image of their earlier one dated 17th July 2015, which primarily sought to set aside the consent order dated 7th July 2015.

20. It is clear from the above that the application dated 17th July 2015 was yet to be heard and determined and that the court's ruling dated 5th April 2017 stayed the consent judgment dated 7th July 2015 pending hearing and determination of the said application dated 17th July 2015. One would wonder why the respondent found it necessary to file the application dated 17th July 2017 while that dated 17th July 2015 was still pending, yet the two applications sought similar prayers. I find that to be an abuse of the court process, and, in my humble view, the respondent's application dated 17th July 2017 cannot stand. What is left for the court to determine is the respondent's application dated 17th July 2015. The question as to whether judgment should be entered for the applicant as against the respondent will be answered by canvassing the issues raised by the respondent in their application dated 17th July 2015 and the applicant's plaint dated 24th May 2017 together with the application dated 4th July 2017.

21. It is not disputed by the respondent that the applicant has certificates of taxed costs against it, but its contention is that it is under no obligation to pay the taxed amount as it did not automatically take over the debts of the defunct local authority. The respondent submitted by referring to a gazette notice dated 24th March 2017, annexed to the affidavit of Moses L. Sande and marked as 'MLS1,' and Section 7 of the Devolved Government Act No. 1 of 2012 which sets out the mode of recovery of the applicant's claim.

22. Section 33 of the Sixth Schedule to the Kenya Constitution 2010, provides that:

> "*33. Succession of institutions, offices, assets and liabilities*
>
> *An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name."*

23. In *Wachira Nderitu Ngugi & Co. Advocates vs. Town Clerk City Council of Nairobi* [2016] eKLR, it was held, and I shall quote the holding *in extenso*, that:

> "*22. According to Kasango, J in Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008, in which the learned Judge cited with approval the decision in Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of*

2006:

> *"Pursuant to the provisions of the said section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities."*

23. Majanja, J who delivered the decision in Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 pronounced himself on the provisions of section 59 of the Urban Areas and Cities Act No. 13 of 2011 as read with Section 33 of the Sixth Schedule of the Constitution. The former provides:

> *"Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force or any defence appeal or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law."*

24. The learned Judge accordingly found that:

> *"The County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgement. The court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See Republic vs. Minister for Land & 2 Others ex parte Kimeo Stores Ltd (2011) eKLR, Kenya National Examination Council vs. Republic exparte Geoffrey Gathenji Njoroge & Others CA Civil Appeal No. 266 of 1996)."*

25. It follows that section 33 of the 6th Schedule is an exception to section 6 thereof hence legal rights and liabilities of the defunct local authorities are to accrue in favour of and be sustained against their successors which in this case are the respective County Governments and not the National Government. Whereas the Transitional Authority (whose term has since lapsed) was empowered to develop the criteria necessary to determine the transfer of functions from the national to county governments, there was an exception provided by section 33 of the Sixth Schedule hence the settlement of decrees against the defunct local authorities is not a function of the national government.

26. The Respondent also relied on section 35 of the Transition to Devolved Government Act, 2012 which stipulates that a state organ, public office, public entity of local authority (defunct) shall not transfer assets or liabilities during the transition period without seeking approval of the Authority. Such a moratorium was the subject of the decision in Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 in which the Court expressed itself as follows:

> *"From the respondent's own deposition, it is clear that the public notice that the Transitional Authority gave was to advise the public to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the liabilities and conclude on its nationwide audit of assets and liabilities of the defunct local authorities, before taking any action against a County Government. [Emphasis added] ...In this case not only has a judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is no longer a question of verifying the liabilities which seems to have been the Authority's concern in the said notice. In my view the issue being raised herein ought to have been raised at the time of the hearing of the application for mandamus since the effect of the moratorium could have been to keep the finding of the respondent liable to satisfy the decree in abeyance. Once that stage was passed the horse had bolted and any attempt to close the stable thereafter would not serve any useful purpose."*

27. I am still of the same view.

28. Whereas the Court in Gateway Insurance Company Limited vs. Treasurer Nairobi County Government & 2 Others (supra) appreciated that the said section forbids the transfer by a State organ, public office, public entity or local authority of assets and liabilities during the transition period, the Court was not prepared to interpret that section to mean that payment of debts accrued by the defunct local authorities which devolve or are transmitted to the relevant County Governments amount to transfer of assets and or liabilities and associated itself with the holding of Majanja, J in Republic vs. Town Clerk of Webuye County Council & Another (supra) that:

> *"... a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."*

29. Similarly, in this case we are dealing with the duty to pay a debt already decreed by a competent Court of law to be due and payable by the defunct local authority which liability has been statutorily and constitutionally inherited by the County Government"

(See also *Republic v Attorney General & another ex-parte Stephen Wanyee Roki* [2016] eKLR).

24. In *Kenya Local Government Workers Union vs. Nakuru County Council on Behalf of Naivasha Municipal Council* [2015] eKLR it was held that:

> *"Various decisions have been rendered by different Courts on the issue whether County Governments are the legal successors of the Local Authorities that existed prior to the promulgation of the Constitution of Kenya 2010 and therefore are legally bound to take over, the assets and liabilities of the defunct Local Authorities as contained in the Transition to Devolved Government Act, 2012.*
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> *In the case of Argos Fisheries Limited Vs. Municipal Council of Mombasa, HCC, MBSA Civil Suit No. 13 of 2008 [2014] eKLR D. S. Majanja J. had this to say;*
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> > *"Although Courts have acknowledged that there are no transitional provisions in the County Government Act, 2012 dealing with actions and legal proceedings that were pending as at the date of the repeal of Local Government Act, the general Legal position adopted is that the legal proceedings which were instituted against defunct Local Authority should proceed against the County Government under whose jurisdiction the concerned Local Authority was located;"*
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> > *and in JAM Umenda & another vs. Municipal Council of Kisii & 6 others, Environment & Land Court of Kenya at Kisii Judicial Review Application No. 3 of 2013 [2013] eKLR Okong'o J. stated:*
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> > > *"Section 33 of the Sixth Schedule to the Constitution 2010 provides that an office or institution established under the Constitution of Kenya, 2010 is a legal successor of the corresponding office or institution or under a former Constitution or under a former Act of Parliament in force immediately before the effective date of the Constitution of Kenya, 2010 whether known by the same name or a new name County Government under the new Constitution took over the powers and functions of the local authorities as they were recognized and defined under the old Constitution and the local Government Act pursuant to the provisions of the said Section 33 of the Sixth Schedule to the Constitution of Kenya 2010, County Governments are therefore the natural and presumptive legal successors of the defunct local authority."*
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> *I am in total agreement with the views expressed by the two learned Judges above and hold that Nakuru County Government is the natural and presumptive legal successor of the defunct Naivasha Municipal Council. The Nakuru County Government is therefore legally bound by the Judgment of Hon. Paul K. Kosgei J. delivered on 31st August, 2007 in favour of the Claimant/Applicant against Naivasha Municipal Council.*
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> *It is equally true that the Governor of Nakuru County Council Mr. Kinuthia Mbugua and the Secretary of the Nakuru County Council, Mr. Joseph Mogusi have a legal obligation to implement the said Judgment on behalf of the Respondent and I so find."*

25. Based on section 33 of the Sixth Schedule to the Kenyan Constitution and the decisions cited above, it is clear that for all intents and purposes, the respondent is the natural and presumptive legal successor of the defunct Municipal Council of Kakamega. All legal proceedings which were instituted by or against, and all debts and liabilities that were incurred by or accrued against the defunct Municipal Council of Kakamega, including the instant one, should proceed against or be recovered from the respondent, who is legally bound to take over the assets and liabilities of the defunct Municipal Council of Kakamega. I, therefore, reject the contention of the respondent that it is not obliged to honour the debts of the defunct municipal council.

26. Having established that the respondent is liable for the debts that were incurred by or accrued to the defunct Municipal Council of Kakamega, the next question to be determined is whether judgment ought to be entered for the applicant and against the respondent for the sum of Kshs. 8,791,507.00 in accordance with the certificate of taxed costs. It should not be lost that there was a consent judgment dated recorded on 7th July 2015, which was stayed by the court pending the hearing and determination of the respondent's application dated 17th July 2015, but on condition that the respondent deposits 50% of the taxed costs in an interest earning account in the names of the parties' advocates. It appears the respondent is yet to do so despite the court's orders. Additionally, failure to comply with the condition imposed on stay of the consent order, and in the absence of any appeal varying or setting aside the said order of the court dated 5th April 2017, would mean that the said stay order has been vacated and that it is open to the applicant to execute for his taxed costs as per the consent order of 7th July 2015.

27. In light of the foregoing, I find that the respondent's application dated 17th July 2017 is an abuse of the court process, and that the same ought to and is hereby dismissed. The respondent's application dated 17th July 2015 is still pending, and the respondent has the liberty to prosecute it, but the stay order lapsed when the respondent failed to make the deposit ordered by the court as a condition for the stay. The applicant's application dated 4th of July 2017 is merited, and, should and is hereby allowed for the reasons given here above. The applicant is at liberty to execute against the respondent for the sum of the certified costs. Any party aggrieved by the orders made in this ruling is at liberty, within twenty-eight (28) days, to appeal against the same at the Court of Appeal. The applicant shall have the costs of these proceedings.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER 2019

W MUSYOKA

JUDGE