



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 145 OF 2015**

**(Consolidated with Civil Appeal No. 146 of 2015)**

(Being an appeal against the ruling of Hon. Wasike Deputy Registrar in Mombasa High Court Misc. Civil Application No. 214 of 2014 delivered on 14th day of September 2015)

**COUNTY GOVERNMENT OF MOMBASA.....APPELLANT**

**VERSUS**

**V.CHOKAA & COMPANY ADVOCATES.....RESPONDENT**

**RULING**

1. Before the court for determination are two applications both dated the 17/9/2015 and seeking similar orders. The two applications are filed separate in the two files as above. For the purposes of this ruling, the two files are consolidated and this ruling shall apply to both.

The application (s) seek orders that:-

- I. **That the matter be certified as urgent and heard *ex-parte* in the first instance and service of the Application be dispensed with in the first instance.**
  - II. **That a temporary order do issue staying execution of orders made by this Honourable Court on 14th day of September, 2015 pending *interpartes* hearing of this Application.**
  - III. **That a temporary order do issue staying execution or orders made by this Honourable Court on 14<sup>th</sup> day of September, 2015 pending *interpartes* hearing of the Appeal.**
  - IV. **That costs of this Application be costs in the cause.**
2. The application is supported by the affidavit of **JIMMY WALIAULLA** sworn on the 17/9/2015. The affidavit highlights and stresses the fact that the Appellant/Applicant being a Government as established under Article 167 of the Constitution is for all intents and purposes a Government under the Government proceedings Act and Civil Procedure Act hence no execution may be taken against it. It is also contended on behalf of the Appellant/applicant that being the successor in title to the Municipal Council of Mombasa, it is my virtue of paragraph 33 of the **6<sup>th</sup> schedule** to the Constitution entitled to the benefits and privileges, the former Municipal Council enjoyed under section 263 A of the Local Government Act. As is the law under Order 42 Rule 6, the

- appellant/Applicant has offered to give such security as the court shall order for the due performance of the order that may ultimately be binding upon it upon the conclusion of the appeal.
3. To the application the Respondent, as the decree holder, filed a Replying Affidavit sworn on the 28.9.2015 in which it is contended that the Deputy Registrar was right in confirming the order *Nisi*, within her jurisdiction; concedes that the appellant/applicant is a successor to the defunct Municipal council of Mombasa and therefore inherited, its debts, but denies that the Applicant is the Government of the Republic of Kenya and therefore entitled to the protection accorded to the Government under the Government Proceedings Act as well as the Civil Procedure Act Order 29; and finally that section 26 A of the Local Government Act stands repealed and not available for application in favour of the appellant/applicant as the similar provisions are not reenacted under the County Government Act.
  4. The appellant/applicant cited to court two decisions to support its contention that it is immuned from execution under both order 21 and 23 Civil Procedure Act.

### **Determination**

5. I have considered the affidavits filed by the parties, oral submissions by the parties and the law under the constitution, statutes and the decided cases in coming to my determination on the application.
6. This being an application of stay of execution pending appeal the court gives consideration to the factors such as: the timeliness within which the application was made; whether the applicant stands to suffer substantial loss unless the stay sought is granted and whether or not the applicant has provided security for the due satisfaction of the decree that might be ultimately binding upon him.
7. On the question whether this application has been filed with due dispatch and promptitude, I note that the order appealed from was made on the 14/9/2015, the appeal was filed on 17/9/2015, simultaneously with application for stay. On the timelines under the law, the applicant cannot be faulted for failure to file the application without undue delay.
8. On whether or not the appellant will suffer substantial loss should the application be declined, the factors to be taken into account must of necessity be the arguability of the appeal, the exceptional difficulty or, hardship likely to be visited upon the applicant if stay is denied and execution ordered to proceed.
9. The applicant before me is a County Government, which by constitution is vested with executive authority. That authority is exercised on established tenets one of which is accountability for the funds. An important element in accountability for public fund, like the funds the Deputy Registrar has ordered to be attached, is to be found in the budgeting process. As known, the County Government get founded by disbursements of budgeted funds from the exchequer and also own collections. In my understanding the budgeting is done and funds committed for every financial year. Every shilling in possession of such devolved units is committed or earmarked for a specific purpose. I am therefore of the persuasion that to order the execution to proceed would be to disrupt the budgetary programmes of the County Government and that would have the ripple effect on the persons resident within the county who have delegated that executive authority to the County Government. In so far as the loss will not sit squarely and solely on the County Government but also upon the general public it serves, I hold that the injury would be substantial.
10. Equally, the applicant alleges that its appeal is premised on the fact that the Government of the Republic of Kenya is now structured into national and county Governments and for that reasons it is a Government insulated against execution Order 23 Civil Procedure Act. Without prejudicing the appeal yet to be heard, I hold the view that if execution proceeds and later on the court finds that indeed, the execution was improper, the court shall have abdicated its duty to the appellant/applicant to give it the benefit of the law. These two situation present to me substantial loss. I will not consider the ability of the Respondent to affect a refund should the appeal succeed for that has not been urged before me. It suffices to say that to deny an individual its protection under the law is one of the harshes actions a court of law and indeed and any state organ can set to allow or condone. It should have thus abdicated its duty under Article 3 of the Constitution.
11. Having so found, the next consideration is to find out if the Appellant/applicant has provided or offered security for that due satisfaction of the decree that may ultimately be binding upon it. At

paragraph 12 of the affidavit of JIMMY WALIAULA, the director of legal services, with the applicant, the deponent says that the appellant/applicant is willing to give any security as the court may order. That to me is a sufficient offer and gives the court the necessary discretion to set a condition that serves the interests of justice in the case.

12. The appeal being against a monetary decree in the sum of Kshs. 7,904,472 with interest and costs of the garnishee proceedings, I order that the appellant/applicant provides security in the sum of Kshs. 8,000,000.

13. The upshot of my finding is that I grant to the appellant/applicant stay of execution of the orders issued by the Deputy Registrar dated the 14/9/2015 in Mombasa High court Misc. Application No. 213 & 214 of 2014 on terms that:-

(a) The Appellant/applicant shall within 30 days from today deposit the sum of Kshs. 8,000,000 into an interest bearing account in the joint names of the advocates for the parties pending the hearing and determination of the appeal herein.

(b) The appellant shall within 45 days from the date hereof compile, file and serve a Record of Appeal to enable the appeal be placed before a Judge for admission and directions.

(c) The parties are at liberty to file and serve their respective submissions within 30 days from the date of service of the Record of Appeal.

(d) costs of the application are ordered to be costs in the appeal.

**Dated, signed and delivered at Mombasa this 4<sup>th</sup> day of December 2015.**

**Mr. Wafula for the Appellant/Applicant.**

**No appearance for Respondent.**

**P.J.O. OTIENO**

**JUDGE**