



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 13 OF 2008

ARGOS FURNISHERS LIMITED.....PLAINTIFF

-VERSUS-

MUNICIPAL COUNCIL OF MOMBASA..... DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff filed this suit against the **MUNICIPAL COUNCIL OF MOMBASA (now defunct)** on 4th February 2008. The claim was based on a contract under which the Plaintiff offered a Hire Purchase Scheme through a Check-Off System wherein the Defendant's employees were allowed to collect assorted goods from the Plaintiff's stores and the Defendant was to deduct the monthly repayment and remit the same to the Plaintiff. The Plaintiff claimed that the Defendant failed to remit deductions amounting to Kshs. 24,933,243.84 which the Plaintiff claimed in the suit.
2. The Defendant filed a Memorandum of Appearance and a Statement of Defence on 13th February 2008.
3. The Plaintiff took out a motion dated 18th April 2008 in which it sought the striking out of the Defendant's Statement of Defence. On 13th March 2009, the Plaintiff's said application was allowed and judgment was entered for the Plaintiff as prayed in the Plaint (Kshs. 24,933,243.84).
4. On 3rd February 2014, the Plaintiff filed an Application for Execution of the Decree indicating that the total decretal amount stood at Kshs. 36,902,700.88 as at the said date.
5. The Plaintiff, on 12th February 2014 took out a Notice to Show Cause directed at **The Secretary, County Government of Mombasa** to appear in court on 28th February 2014 to show cause why execution should not be granted. Hearing of the Notice to Show Cause was variously adjourned and the Plaintiff finally fixed it for hearing on 13th June 2014.
6. On 5th June 2014, the Defendant filed a Notice of Motion dated 5th June 2014 which is the subject of this Ruling. In that Application, which is brought under Sections 3, 3A and 63 (e) of the Civil Procedure Act Cap. 21, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules 2010, the Defendant seeks the following orders:
 - i. **Spent.**

- ii. **Spent**
- iii. **That this Honourable Court be pleased to order the stay of execution of the decree herein pending the final determination of the Transition Authority on the transfer of the assets and liabilities of the defunct local authorities, including the Municipal Council of Mombasa.**
- iv. **That in the alternative this Honourable Court be pleased to strike out the Notice to Show Cause dated 12th February 2014 with costs.**
- v. **That costs of the Application be provided for.**

THE DEFENDANT'S/APPLICANT'S CASE

- 7. The Defendant's Application is supported by the Affidavit of ROSE NGOWA who describes herself as the Mombasa City Manager. The Defendant also filed a Supplementary Affidavit sworn by the same deponent on 9th July 2014 which was filed alongside the Defendant's Written Submissions dated 9th July 2014.
- 8. The Defendant's case is that pursuant to the enactment of the Constitution of Kenya, 2010, a new system of governance came into existence under which the County Governments took over most of the functions previously undertaken by the defunct local authorities but the former did not take over the assets and liabilities of the defunct local authorities. That there is an elaborate procedure presently being undertaken to establish assets and liabilities and to determine the manner of transfer of such assets and liabilities from the defunct local authorities to the County Governments. The Defendant submitted that since the defunct Municipal Council of Mombasa was a distinct legal entity from the County Government of Mombasa, it cannot be assumed that the liabilities of the former, such as the decree herein, automatically attached to the new County Government. In essence, the Defendant's case is that the process under which the County Government of Mombasa may assume the assets and liabilities of the defunct Municipal Council of Mombasa is still underway and therefore the County Government of Mombasa should not satisfy the decree herein until that process is completed.
- 9. The Defendant submitted that the transition from the defunct local authorities to the new County Governments is governed by the Transition to Devolved Government Act, 2012 particularly section 7 which creates the Transition Authority with its functions provided for as follows:

“(1) The Authority shall facilitate and co-ordinate the transition to the devolved system of government as provided under section 15 of the Sixth Schedule to the Constitution.

(2) Despite the generality of subsection (1), the Authority shall—

(a) ...

(b) ...

(c) ...

(d) ...

(e) prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities;

(f)...

(g) ...

(h) pursuant to section 15(2)(b) of the Sixth Schedule to the Constitution, develop the criteria as may be necessary to determine the transfer of functions from the national to County Governments, including—

(i) ...

(ii) the criteria to determine the transfer of previously shared assets, liabilities and staff of the government and local authorities....”

10.The Defendant stated that pursuant to section 36 of the Transition to

Devolved Government Act, 2012, the Transition to Devolved Government (**Transfer of Assets and Liabilities**) Regulations, 2013 (hereinafter “**the Transition Regulations**”) were made. That the Transition Regulations created a technical committee known as the Technical Committee of the Authority with the functions *inter alia* to prepare, validate and submit an inventory of public assets and liabilities to the Transition Authority and advise the Authority on the transfer of shared assets and liabilities. The Defendant therefore submitted that the County Government of Mombasa is awaiting the stated process involving the Technical Committee of the Authority to be finalized so as to be accordingly guided on the issue of transfer of assets and liabilities of the defunct Council. I wish to observe that although the Defendant did exhibit as an annexure to its Supporting Affidavit the said Transition Regulations, the authenticity of the document cannot be verified as it appears like a computer generated document. It is not published in the official Kenya Gazette. Although it is titled Legal Notice No. 45, there is no telling the Number of Gazette Notice under which it was published.

11.In a nutshell, the Defendant's case is that the County Government of

Mombasa is not in a legal position to satisfy the decree until such a time that the Transition Authority shall have made a determination on the transfer of the assets and liabilities of the defunct Municipal Council of Mombasa to the County Government of Mombasa. To support its position that the taking over of assets and liabilities of the defunct local authorities by the new County Governments should await the determination process by the Transitional Authority, the Defendant relied on the case of **Republic v County Secretary Murang’a County Government Ex-parte Stephen Thiga Thuita, Murang'a High Court Judicial Review Application No. 1 of 2013 [2014] eKLR** where Ngaah, J. held as follows:

“The closest law that appears to address the devolution of assets and the assumption of liabilities of the local authorities prior to their extinction is the Transition to Devolved Government Act, Chapter 265A, of the Laws of Kenya. With the emergence of the County Governments, the assets and pre-existing liabilities of the now defunct local authorities were to be shared between those County Governments and the national government. The body that was established to work out how this distribution was to be done was the Transition Authority which is created under section 4 of the Transition to Devolved Government Act. Among its functions set out in Section 7 of that Act, the Transition Authority is required to prepare and validate an inventory of

all the existing assets and liabilities of government, other public entities and local authorities. Once this is done it is upon the Transition Authority to come up with the criteria to determine the transfer of previously shared assets, liabilities of the government and local authorities. As at the time this application was argued, there was no evidence and none was brought to the attention of the court that such a criteria is now in place as contemplated under the Transition to Devolved Government Act. Without this criteria, it would be premature to attribute the local authorities' pre-existing liabilities to the County Governments.”

12. The Defendant is therefore asking that the execution process herein be

stayed until the said process of transfer of the assets and liabilities from the defunct Municipal Council of Mombasa to the County Government of Mombasa is completed by the Transitional Authority.

The Plaintiff's/Respondent's Response

13. The Plaintiff filed a Replying Affidavit sworn by WILFRED AKHONYA

MUTUBWA on 13th June 2014 and Written Submissions filed on 16th July 2014.

14. The Plaintiff's response is that the mandate of the Transition Authority

under Section 7 (2) (h) (ii) of the Transition to Devolved Government Act, 2012 is only limited to the determination of the transfer of assets and liabilities that were previously shared between the national government and Municipal Council of Mombasa. That the liability to satisfy the decree in this case is not a shared liability therefore the County Government of Mombasa as the successor to the Municipal Council of Mombasa is obligated to pay the decretal sum.

15. The Plaintiff submitted that according to the Preamble to the

Transition to Devolved Government Act, 2012 as read together with Section 15 of the Sixth Schedule to the Constitution of Kenya, 2010, the functions of the Transitional Authority is only limited to assets and liabilities to be transferred from the national government to the County Government.

16. The Plaintiff further submitted that the Defendant's Application is

incompetent for citing the wrong provisions of the law. That the Application is brought under Order 22 Rule 22 of the Civil Procedure Rules, 2010 which only applies to instances where a judgment debtor

wishes to apply to the court which passed the decree for stay of execution of the decree or to the appellate court for stay pending appeal, which is not the case here. That by citing the wrong provisions of the law, the court is at odds on how to exercise its jurisdiction and as such the application should fail. The Plaintiff, however, did not indicate under what provision of the law the Defendant's application ought to have been brought.

Issues for Determination

17. In my view, there are two main issues for this Court's determination:

- i. Whether the Defendant's application should fail for citing the wrong provisions of the law.**
- ii. Whether there should be stay of execution of the decree herein pending the final determination by the Transition Authority on the transfer of the assets and liabilities of the defunct Municipal Council of Mombasa.**

ANALYSIS

18. I will start with the first issue. The overriding objective of the Civil Procedure Act, Cap. 21 of the Laws of Kenya as enshrined in Section 1A thereof is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. This Court is mandated by Article 159 (2) (d) of the Constitution of Kenya, 2010 to administer justice without undue regard to procedural technicalities. I do not think that the application should fail for having been brought under Order 22 Rule 22 of the Civil Procedure Rules. This position is backed by the decision in the case of **Thomas Ratemo Ongeri & 2 Others v. Zachariah Isaboke Nyaata & Another Kisii High Court Environment and Land Civil Case No. 95 of 2004 [2014] eKLR**, where Okong'o, J. stated as follows:

“On the Defendants’ argument that the application has been brought under the wrong provisions of the law, I am fully in agreement. That however is a procedural technicality that this court would overlook for the sake of substantive justice pursuant to Article 159 (2) (d) of the Constitution of Kenya.”

19. The same position was adopted in the case of **Nancy Nyamira & Another V Archer Dramond Morgan Ltd [2012] eKLR** where Ngugi, J. held that:

“Next, the Defendant argues that the Plaintiffs’ application must fail because it cites the wrong provisions of law. The Enforcement Application cites Order XLIV, Rule 17. The Defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma’s remarks *Salume Namukasa v Yozefu Bukya* (1966) EA 433, invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in *Gitau v Muriuki* [1986] KLR 211 which I now follow to hold that in as long as a party’s invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded.”

20. The Plaintiff’s argument that the application should fail for having cited the wrong provisions must therefore be rejected.

21. I now move to the second issue of whether the execution process should be stayed. The Constitution of Kenya, 2010 which was promulgated on 27th August 2010 introduced a new system of governance under which the local authorities were removed and a system of County Governments introduced. The Local Government Act, Cap. 265 Laws of Kenya was subsequently repealed and replaced by the County Government Act, 2012.

22. Following the repeal of the Local Government Act, Cap. 265 Laws of Kenya, an issue that has arisen in courts is whether legal proceedings that were instituted against local authorities prior to the repeal of the said Act and which were still pending before courts at the time of the repeal are sustainable against the new County Governments. Put differently, the issue has been whether legal proceedings filed against or by the defunct local authorities should proceed as against or by the new County Governments.

23. Although courts have acknowledged that there are no transitional provisions in the County Governments Act, 2012 dealing with actions and legal proceedings that were pending as at the date of the repeal of the Local Government Act, the general legal position adopted is that the legal proceedings which were instituted against defunct local authorities should proceed as against the County Government under whose jurisdiction the concerned local authority was located. This position was adopted in the case of **J.A.S. Kumenda & Another v Clerk Municipal Council of Kisii & 6 Others, Environment & Land Court of Kenya at Kisii, Judicial Review Application**

No. 3 of 2013 [2013] eKLR where Okong'o, J. stated as follows:

“I agree with the submission by the advocates for the respondents that after the repeal of the Local Government Act, local authorities and institutions that were constituted thereunder... ceased to exist as legal entities and as such cannot sue and be sued and can neither proceed with nor be proceeded against with respect to any pending suit. I don't agree however that the suits that had been instituted by and against the defunct local authorities some [of] which are pending rulings and judgments must remain in limbo until such a time that the body referred to in section 59 aforesaid of the Urban Areas and Cities Act is set up. From my reading of the Urban Areas and Cities Act and the transitional provisions of the Constitution of Kenya, 2010, I have formed the opinion that such suits can be proceeded with by and against the County Governments...

Section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 provides that, an office or institution established under the Constitution of Kenya, 2010 is a legal successor of the corresponding office or institution under the 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 Governments 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 authorities.”

24. In another case of **Republic v Town Clerk of Webuye County Council**

& Another, Nairobi High Court Judicial Review Application No. 448 of 2006, [2014] eKLR, Majanja, J. held as follows on the transition from defunct local authorities to the County Governments regarding pending suits:

“Despite the statutory lacuna's in the County Government Act and the Urban Areas and Cities Act, the rights accrued as a result of the litigation are preserved upon repeal of the Local Government Act by the Constitution. Section 33 of the Sixth Schedule to the Constitution provides for succession of institutions upon promulgation. It states that, '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.'

In my view and taking into account the legal provisions I have cited, 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 judgment.”

25. The Defendant/Applicant does not contest that the County Government of Mombasa is the right institution against whom this case, which was instituted against the defunct Municipal Council of Mombasa, should be proceeded. All the Defendant is asking is that before the County Government of Mombasa satisfies the decree herein, the transitional process that will see the transfer of the assets and liabilities of the defunct Municipal Council of Mombasa should be finalized first.

26. This is a case in which the Plaintiff is already holding a decree following the judgment which was entered in its favour over five years ago, on 13th March 2009. The execution process should not,

in my view, be stayed unless for just cause. It is agreed that the County Government of Mombasa should take over this case in place of the defunct Municipal Council of Mombasa. The only issue in contention is whether the taking over should be immediate or whether the same should await the so called final determination by the Transitional Authority on the transfer of the assets and liabilities of the defunct local authorities. The Defendant has not made it clear when the Transitional Authority is likely to conclude that process.

27. The Transition to Devolved Government Act, 2012 provides in the Fourth Schedule that:

“During Phase One of the transition period, the Authority shall carry out the following activities—

(a) ...

(b) audit assets and liabilities of local authorities, to establish the asset, debts and liabilities of each Local Authority;

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h)...

(i) ...

(k) ...

(l) ...

(m) ...

(n) provide for a mechanism for the transfer of government net assets and liabilities to national and county governments;

(o) provide mechanisms for the transfer of assets and liabilities which may include vetting the transfer of assets during the transitional period;

(p) provide for a mechanism that will secure assets and liabilities held by the Local Authorities...”

28. Section 2 of the Transition to Devolved Government Act, 2012 defines **“Phase One”** of the transition period as **“the period between commencement of this Act and the date of the first election under the Constitution”**. The date of commencement of the Act was **9th March 2012**. The first election under the Constitution of Kenya, 2010 was held on **4th March 2013**. That implies that Phase One of the transition period under the Act was between 9th March 2012 and 4th March 2013. During that period, the Transitional Authority should have carried out an audit of assets and liabilities of local authorities, to establish the asset, debts and liabilities of each Local Authority and provided mechanisms for the transfer of such assets and liabilities. In my view, these activities entail what the Defendant describes as **“final determination of the Transitional Authority on the transfer of the assets and liabilities of the defunct local authorities”**. It therefore

follows that the activity which the Defendant is seeking to be finalized before the execution process herein can proceed was or should have been legally concluded at Phase One of the transition process which ended by 4th March 2013.

29. The Defendant supplied a copy of Transition Regulations to demonstrate that the process of transfer of assets and liabilities from the defunct local authorities to the County Governments is still on going. I have already expressed my doubt as to the authenticity of that document. Nevertheless, even if the document was authentic, regulations promulgated pursuant to the provisions of an Act cannot supersede the Act itself. The Fourth Schedule to the Transition to Devolved Government Act, 2012 clearly stipulates that the Transitional Authority should have completed the audit and transfer process of the assets and liabilities of the defunct local authorities by 4th March 2013. Thus, it is legally inaccurate for the Defendant to claim that the process of determination by the Transitional Authority on the transfer of assets and liabilities is still going on and that the execution herein should be stayed pending conclusion of that process. In my view, and contrary to the holding of the High Court in **Republic v County Secretary Murang'a County Government (supra)**, the court process should not be suspended to enable the Transitional Authority do that which, according to law, it ought to have concluded by 4th March 2013.

30. I am further guided by the decision in **J.A.S. Kumenda Case (supra)** where Okong'o, J. held that suspending legal proceedings that were existing against defunct local authorities would result in an absurd and a manifestly unjust situation for litigants and would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities. The learned Judge stated as follows:

“It follows therefore that until the body referred to in section 59 of Urban Areas and Cities Act is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated. To hold as argued by the respondents herein that such legal proceedings should remain suspended until such a time that the said body is set up would result in an absurd and a manifestly unjust situation for the hundreds of litigants who have pending suits against the defunct local authorities. Such holding would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities which are pending rulings and judgments before them”.

31. Although the learned Judge talked of establishment of a body under Section 59 of Urban Areas and Cities Act, 2011 which provides that **“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”**, Majanja, J. in the case of **Republic v. Town Clerk of Webuye County Council (supra)** rightly held that the County is the legally established body unit contemplated under the law to take the place of local authorities in pending legal actions. That, therefore, means that there is no need to wait for the establishment of another body unless expressly provided for by law.

32. Before I conclude, one other issue that I wish to briefly tackle is whether the Plaintiff erred by amending the Notice to Show Cause by substituting the name of Municipal Council of Mombasa with that of the Secretary County Government of Mombasa. In my view, doing so without leave of the court was irregular. However, that alone should not lead to the striking out of the Notice to Show Cause. The court has discretion under Order 8 Rule 3 of the Civil Procedure Rules, 2010, to allow a party to amend its pleadings. This was the holding in the case of **John Michael Wanjau v Municipal Council of Eldoret, Eldoret High Court ELC Case No 285 of 2013, [2013] eKLR** where Sila, J. stated that: **“...under the provisions of Order 8 Rule 3, the court also has discretion to permit a party to amend its pleadings”**. Even if the Notice to Show Cause was

issued without the amendment to substitute the names, in my view, that would not be a reason for the Secretary, County Government of Mombasa to fail to honour the Notice because the same was clearly addressed to him, with the full knowledge that the County Government of Mombasa is now mandated to satisfy the decree in place of the defunct Municipal Council of Mombasa. I will nevertheless grant the Plaintiff leave to amend the Notice to Show Cause to reflect the name of the Secretary, County Government of Mombasa in place of the defunct Municipal Council of Mombasa.

CONCLUSION

33. In light of the foregoing, I find and I hold that the execution process

should not be stayed because of two reasons:

- i. **There is no dispute that the decree herein should now be satisfied by the County Government of Mombasa in place of the defunct Municipal Council of Mombasa; and**
- ii. **The transitional process of determination of the assets and liabilities of the defunct Municipal Council of Mombasa by the Transitional Authority for transfer purposes ought to have been concluded by 4th March 2013 and is no longer pending according to the Fourth Schedule of the Transition to Devolved Government Act, 2012.**

34. The Notice of Motion dated 5th June 2014 is therefore dismissed with costs to the Plaintiff and the Notice to Show Cause is hereby permitted to proceed as ordered to be amended.

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE