



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 69 OF 2018

IN THE MATTER OF: AN APPLICATION OF ORDER OF MANDAMUS AGAINST THE 1ST AND 2ND RESPONDENTS OF THE COUNTY GOVERNMENT OF MOMBASA

AND

IN THE MATTER OF: SECTION 44(1) OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012 AND SECTION 59 OF THE URBAN AREAS AND CITIES ACT NO. 13 OF 2011, ARTICLE 156, 176 OF THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

V. CHOKAA & COMPANY ADVOCATES.....APPLICANT

AND

1. COUNTY SECRETARY (MOMBASA COUNTY)

2. CHIEF FINANCE OFFICER/COUNTY TREASURER

(MOMBASA COUNTY).....RESPONDENTS

RULING

The Application

1. By an Amended Notice of Motion dated 3rd January, 2019 the Applicant prays for the following orders:

(a) That this application be certified as urgent and be heard ex-parte in the first instance.

(b) That the Application herein be issued with An order of mandamus against 1st and 2nd Respondents, the County Secretary and the Chief Finance Officer both of the County Government of Mombasa compelling them to forthwith and without delaying perform their duty by causing to be paid the Applicant V. Chokaa & Co. Advocates out of the Revenue of the County Government of Mombasa the Sum of Kshs. 6,612,000/=together further accrual and accruing interests thereon Court rates of (14%) per annum from 16th December,2014 until payment in full.

(c) That Costs of the Application be provided for.

(c)(i) That costs of this Application be provided be paid for by the Respondents.

2. The motion is premised on the grounds set out therein and is supported by affidavit of Vincent Chokaa sworn on 3rd January, 2019 and affidavit sworn on 29th January, 2019. The Applicant's case is that in the year 2009 and 2010 the Municipal Council of Mombasa (and later the County Government of Mombasa) engaged it to undertake certain legal work on behalf of the County Government. That it successfully undertook and provided legal services to the County Government but upon presenting fee notes for work done the County Government refused and neglected to pay the fee notes. In accordance with the provisions of the Advocates Act the Applicant was forced to file bills of costs for Taxation against the County Government of Mombasa so that the fees payable to it could be assessed and taxed by the Deputy Registrar of this Court in the High Court Miscellaneous Civil Application No.213 of 2014. The said Bills of Costs were assessed and taxed

by the Deputy Registrar on 16th December, 2014 in the amounts of Kshs.6,612,000/= (copy of the Certificate of Taxation is attached “**Marked VC 1**”). Upon failure by the County Government of Mombasa to pay taxed costs the Applicant made applications for judgment to be entered against the County Government for the taxed costs in accordance with the provisions of the Advocates Act. Such Judgment was by consent entered on 1st July, 2015 (copy of the order for consent Judgment is attached and “**Marked VC 2**”). The County Government of Mombasa filed an Appeal against the said Judgment being Appeal No.145 of 2015 and orders and ruling was given on 4th December, 2015 and the County Government of Mombasa did not honor those orders. (The said copy of order is annexed and “**Marked VC3**”). On 16th March, 2018 the County Government of Mombasa was served with a decree dated 1st July, 2015 and issued on 15th March, 2018 whereby they acknowledged receipt by stamping and signing it. (Annexed was the copy of decree” **Marked VC 4**”). On 13th August, 2018 the Applicant wrote a reminder notice to the Respondent in regard to payment to the Applicant but the Respondents neglected and or failed. (Annexed was the said letter and “**Marked VC5**”). The Applicant states that the 1st and 2nd Respondents have refused to make payment of the decretal sum to date and or failed or refused to honor the said order that was issued on 4th December, 2015 deliberately. The Applicant states that unless the Respondents are compelled by this Court they do not seem to have any inclination and or desire to obey orders of this Court and satisfy the decree issued herein. The Applicant states that the Respondents have failed in their public duty conferred by the statute to make the aforesaid payment in satisfaction of the decree. The only avenue open to the Applicant is to compel the Respondents by way of Mandamus to satisfy the said Judgment.

The Response

3. The application is opposed by the Respondent vide a Replying Affidavit sworn by **Mtalaki Mwashimba** on 15th January, 2019, and by a Further Affidavit sworn on 31st September, 2019. The deponent is the County Attorney of the 1st Respondent. The Respondent’s case is that, the Judgment relates to legal fees incurred by the now defunct Municipal Council of Mombasa between the year 2009 and 2010. The Respondent states that the Applicant was required to submit its alleged contractual debt to the Transitional Authority that was established to ensure smooth transition to the devolved system of government for verification, there having been no judgment as at the time the cause of action arose. The Respondent states that further to the above paragraph, prior to 2013 the decree and certificate of costs would have been enough verification and therefore, since what was there as at the time the cause of action arose was but a debt in the form of legal fees incurred by the now defunct Municipal Council of Mombasa, it ought to have been presented before the Transitional Authority for verification as required by law. The Respondent states that the failure by the Applicant to forward its then debt to the Transitional Authority contravened section 35 of the **Transition to Devolved Government Act, 2012** which stipulates that a state organ, public office, public entity or local authority (defunct) shall not transfer assets or liabilities during the transition period without seeking approval of the Authority. As such, although the County Government of Mombasa was sued on behalf of the now defunct Municipal Council of Mombasa, in the absence of clear directions by the Transitional Authority regarding the debt it will not be proper for the Applicant to assume that the responsibility to settle the said debt lies with the County Government of Mombasa. Therefore, it was submitted, in line with Section 35 of the **Transition to Devolved Government Act, 2012** the debt having accrued prior to the devolved system of Government and it not having been verified by the then transitional Authority under the law, the claim is time barred. It is submitted that the Applicant seeks the assistance of the Court in perpetuating an illegality by filing the Application herein knowing very well that the County Government is not responsible for ensuring that the amount is paid and asking it (The County Government of Mombasa) to pay the requested sum will be akin to perpetuating an illegality contrary to public policy. Therefore, it is the Respondents’ contention that the Court lacks the requisite jurisdiction to handle the matter and should proceed to dismiss it with costs to the Respondents.

Submissions and Determination

4. Parties made oral submissions in court on 21st February, 2019. I have carefully considered the application and the submissions. In my view the only issue for determination is who is responsible to pay the decree before the court. There is no question about the validity of the decree which arose from Mombasa High Court Miscellaneous Application No. 213 of 2014. The County Government of Mombasa was the Respondent. No issue was raised that the County Government of Mombasa was not the proper party to those proceedings. The Judgment obtained against the County Government in those proceedings was by **Consent** and the County Government of Mombasa was represented by its advocates who infact dictated the recording of the consent Judgment. The issue of it not being the proper party to those proceedings was again not raised in the recording of the consent copy annexed and marked “**VC1**”. In any event in an attempt to appeal against the said Judgment the County Government of Mombasa was on 4th December 2015 ordered to deposit a sum of Kshs. 8,000,000 (Eight million) in a joint interest earning account in the names of the advocates on record for the parties within 30 days. It has to date not done so. (A copy of the order is attached marked “**VC 2**”). In law the County Government of Mombasa is the Successor to the Municipal Council of Mombasa to whom the Applicant had rendered legal services and is legally bound to satisfy debts owed by the defunct Municipal Council of Mombasa. That obligation to pay for the services was not a shared debt between the County Government and the National Government or any other County Government over which the Transitional Authority had to make a decision as to who should pay the debt. The debt is the sole responsibility of the County Government of Mombasa. The function of the Transition Authority was to facilitate and Coordinate the transition to devolved government but not to determine the liabilities of the County Governments. The debt the subject matter of these proceedings is a debt acknowledged by the County Government of Mombasa to be due to the Applicant.

5. It is the finding of this court that the County Government of Mombasa has participated in the events leading to the decree, and they cannot purport or expect to be excluded from paying the decree when all along they have defended the action.

6. From the foregoing the Amended Notice of Motion before the court dated 3rd January, 2019 is allowed as prayed with costs to the Applicant.

Dated, Signed and Delivered in Mombasa this 4th day of April, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Oyier holding brief Chokaa for Applicant

Mr. Tajbhai holding brief Kisingo for Respondent

Mr. Kaunda Court Assistant