



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISC CIVIL APPLICATION NO. 213 OF 2014
(CONSOLIDATED WITH MISC NO 214 OF 2014)

V. CHOKAA & CO. ADOVCATE.....APPLICANT/ADVOCATE

VERSUS

COUNTY GOVERNMENT OF MOMBASA AS

SUCCESSOR OF MUNICIPAL COUNCIL OF MOMBASA.....RESPODENT/CLIENT

AND

COOPERATIVE BANK OF KENYA, MOMBASA

NKRUMAH ROAD BRANCH.....GARNISHEE

RULING

1. The applicant, **Vincent Chokaa advocate t/a as V.Chokaa & advocate t/a as V.Chokaa & co. Advocates**, approached the court by an application by way of Notice of Motion dated 16.2.2016 and sought an order for the attachment of all funds held by the garnishee, as a banker of the judgment debtor, towards the satisfaction of the decree obtained by the applicant against the defendant in the sum of Ksh. 6,612,000.
2. When the matter came before court under certificate of urgency on the 16.2.2016, the court directed that parties attend court and address the court on two preliminary issues;
 - (a) **What because of the orders by the Deputy Registrar dated 14.9.2015?**
 - (b) **Is a County Government liable to execution in the manner sought by the decree holder?**
3. That direction seems not to have been complied with because record shows that the next time the matter was in court, the applicant, the respondent and the garnishee were all represented by advocates but matter was adjourned to enable Mr Yaluala advocate for the Applicant / Advocate take instructions on questions raised by the court and for Mr. Kongere Advocate to regularize his position as appearing for the garnishee.
4. However when the matter was next in court and the application was urged the two questions remained unaddressed and outstanding and it appears that both the advocate for the garnishee and the advocate/applicant did not expressly address the two issues. The consequence of that failure is that the court will now consider the application before it not solely on the law cited by the parties and positions

taken by them but with full regard to the law as may be available and accessible to the court.

5. Worth of note is the fact that the Respondent/Client did not attend the hearing while the garnishee did take the stand that, being an uninterested party in the dispute between the Advocate/Applicant and his client, the respondent. The Garnishee simply informed the court, based on the affidavit filed, that the garnishee was only in possession of the sum of Ksh 134,208.40 which it was prepared to pay out upon court order and that the garnishee costs should be provided for from the funds if holds.

6. My view of the application is that it stands to be determined by seeking and providing an answer to one question; whether a County overnment is a Government in terms of Government Proceedings Act and therefore immune from execution in the usual manner.

Analysis and Determination.

7. It is decreed by the words of Article 10 of the Constitution that devolution of executive power is a cardinal value and principle of governance in Kenya.

8. The answer to the only question I have posed above is neither moot nor novel. It is a path now repeatedly travelled by courts. The legislature has equally followed the cue by the courts and sought to make the hitherto laborious interpretation of the law in that regard simpler. It is instructive that by **Kenya Gazette Supplement No 2009(Act No 35)** dated the 24th December 2015 Section 21 of the Government Proceedings Act was amended to introduce sub-section 5 which now reads:-

“(5) This section shall, with necessary modification, apply to any civil proceeding by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party”

9. Prior to the amendment, the provision ended at sub-section 4 which bars execution against the Government on the following terms:-

(4) Save for as provided in this section, no execution or attachment or process in the nature thereof shall be issues out of any court for enforcing payment by the government of any money or costs, and no person shall be individually liable under any order for the payment by the government, or any governmentdepartment, or any officer of the government as such, of any money or costs.”

10. Prior to the introduction of the sub-section (5), the court, G V Odunga, J, in **Republic, exparte Wachira Nderitu Ngugi & Co. Advocates, vrs Nairobi City Council and another [2016] e KLR** and E K O Ogola, j, in **Kilimanjaro Safari Club Limited Vs governor, Kajiado county [2014]e KLR** had given the following determinations when they said:

G V ODUNGA, J

“Article 189 (1) a of the Constitution provides that Government at either levels shall perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of Government at the other level and respect the Constitutional status and institutions of government at the other level and in the case of County Government within the County level. In my view a holistic approach to this provision would lead to the conclusion that there is only one Government being exercised at two levels both levels complementing each other and operating in spirit of cooperation and complementariness”.

E K O OGOLA, J

“I think I have said enough to show that a county Government is a Government as per the Government Proceedings Act. Therefore the proceedings of the said Act apply to proceedings brought against County Governments”

11. I wholly associate myself with those enunciations and interpretation of the Constitution and I would do so even before the amendment to Government Proceeding Act. However now that the statute has been amended, as I have said before, it is a lot easier and more apparent that the provisions of Government proceedings Act apply to County Government as much as it does to the National Government with the consequence that it gives immunity from execution in the manner anticipated by both order 21 and order 22 Civil Procedure Act.

12. The application herein has sought to attach the moneys held by the garnishee as bankers to the respondent. That is what the provisions of sections 21, Government Proceedings Act was designed to govern. There is no room for the attachment of any property of the respondent because all a decree-holder ought to do is to extract a decree, a certificate of order against the government and serve the same against the respondent and thereafter demand settlement of decree. Where the County Government became adamant or just recalcitrant after all that is done, an applicant has the remedy in the prerogative orders of mandamus. The decree holder has no justification to seek to enforce his decree otherwise.

13. An order of mandamus would compel the accounting officer to the department concerned with payment to effect payment and on default the matter is then perceived as contempt of court for which one then becomes liable to punishment.

14. The upshot of the forgoing is that the court finds and holds that execution by attachment of debt as sought by the applicant is not available against the respondent and that to allow the application would be to affront the law. The application therefore fails and stands dismissed but without costs as the respondent did not oppose the same.

15. On the costs of the garnishee, this court finds that the applicant was not entitled to initiate the application in the first place. He in fact dragged the garnishee into court and led it incur costs that a cursory obedience to the law would have avoided. For that reason I award the garnishee the costs of the garnishee proceedings which I assess at Ksh 20,000.

16. It is so ordered.

Dated and delivered this 15th day of July 2016.

In the presence of:

N/A for the Applicant

N/A for the Respondent

N/A for the Garnishee

P. J.O. OTIENO

JUDGE