



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 13 OF 2008**

**ARGOS FURNISHERS LIMITED ..... PLAINTIFF**

**V E R S U S**

**MUNICIPAL COUNCIL OF MOMBASA .....DEFENDANT**

**RULING**

1. The Defendant by Notice of Motion dated 6<sup>th</sup> October 2014 which is the subject of this Ruling seek order for stay as follows-

**“THAT this Honourable Court be pleased to order a stay of execution of the Ruling and all consequential orders arising from the Ruling of this Honourable Court delivered on 18<sup>th</sup> September, 2014 pending the hearing and determination of the intended appeal in the Court of Appeal.”**

2. The Defendant’s earlier application dated 5<sup>th</sup> June 2014 sought that the Court do grant stay of execution of the decree *“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.”* The Court by its Ruling dated 18<sup>th</sup> September 2014 rendered itself by dismissing the application dated 5<sup>th</sup> June 2014. There was, as it will be noted, no positive order made by that Ruling that can be the subject of a stay pending appeal application.

3. On that ground alone the Defendant’s Notice of Motion dated 6<sup>th</sup> October 2014 is dismissed. If authorities for that dismissal is required I refer to the following cases-

4. In the case **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCE –Vs- ORANGA & OTHERS [1976-80] KLR** the Court of Appeal stated-

**“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”**

5. The Court of Appeal also was of the same sentiments in the case **EXCLUSIVE ESTATES –Vs- KENYA POSTS & TELECOM CORP & ANOTHER [2005]1 EA** viz-

**“The Order which dismissed the suit was a negative order which is not capable of execution. If the order sought is not granted, the appeal will not be rendered nugatory because if the appeal succeeds the dismissal order will be set aside and the suit will be restored on the register. The applicant has not sought an order for stay of execution of the decree on costs of the dismissed suit. It appears that there is no likelihood of the first Respondent seeking to recover costs of the dismissed suit from the applicant**

**because one of the grounds for applying for the security of costs in the Superior Court was that the applicant is a dormant company without any assets.”**

6. The Court of Appeal in the case **FRANCIS KABAA –Vs- NANCY WAMBUI & ANOTHER CIVIL APPLICATION NO. NAI 298 OF 1996 (UR)** dealt with the same issue and had this to say:-

**“The application according to the Notice of Motion is to stay the order of Amin J. in which he dismissed the Plaintiff’s suit then before him. Before us, the applicant says that what he wants is a stay of an order that he should pay costs. But this is not really what order of Amin J. was all about. In any case, even if that were so, the Appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs. The Appellant has also not given any cogent reason why he should be granted stay.”**

7. Having made a finding that what Defendant seeks to say was a negative order which as the above authorities show cannot be stayed there is no need to consider whether Defendant has met the condition of granting stay.

8. Accordingly the Notice of Motion dated 6<sup>th</sup> October 2014 is dismissed with costs to Plaintiff.

**DATED and DELIVERED at MOMBASA this 3<sup>RD</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**