



Capital Medical & Surgical Limited v County Government of Machakos & another (Judicial Review Application E007 of 2020) [2024] KEHC 9375 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION E007 OF 2020**

**FR OLEL, J
JULY 30, 2024**

BETWEEN

CAPITAL MEDICAL & SURGICAL LIMITED APPELLANT

AND

COUNTY GOVERNMENT OF MACHAKOS 1ST RESPONDENT

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MACHAKOS 2ND
RESPONDENT**

RULING

A. Introduction

1. Before court for determination is the 2nd respondent/Applicant chamber summons Application dated 29th June 2022, which is brought pursuant to provisions of Order 1 Rule 10(1), (2) and (22) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 148 of the Public Finance Act, and all other enabling provisions of law. The 2nd Respondent/Applicant seeks for orders that ;
 - a. The applicant herein County Secretary, County Government of Manchakosbe struck out from these judicial Review proceedings.
 - b. Spent.
 - c. Spent
 - d. Costs of this Application be provided for.
2. The Application is supported by the grounds on the face of the said Application and supporting Affidavit of one Grace Munguti, the county secretary, county government of Machakos. This Application is opposed by the respondents who filed their replying Affidavit through one Grace Wangui, counsel for the applicant/respondent.



B. The Application.

3. The 2nd Respondent/applicant did aver that she in her capacity as the county secretary, had been wrongly sued and enjoined in these proceedings. The basis for saying so, was that by virtue of section 148 of the Public Finance Management Act, 2012, it was the county executive committee member in charge of Finance who was responsible for designating in writing, officers as accounting officer responsible for managing the finances of county departments and entities.
4. The. under the said section 148 of the Public Finance Management Act, 2012, the persons so appointed as the accounting officers, “Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.” The applicant averred that she was not the designated accounting officer of the health department, which had incurred this debt and she could therefore not be held to be vicariously liable for the responsibilities of designated officers empowered by law to manage the said department finances and pay off its liabilities.
5. The 2nd Respondent therefore urged the court to find that she was improperly enjoined as a respondent in this matter and prayed that the office of county secretary be struck out of these proceedings.
6. This application is opposed by the respondent who aver that this matter originated from Machakos Civil Suit No 284 of 2017, Capital Medical & Surgical Limited v Machakos County Government, where judgment was delivered in their favor in the sum of Kshs 1,118,328/= plus costs and Interest on the decretal sum from the date of filing the suit until payment of the decretal amount in full. Pursuant to the decree and certificate of costs issued on 6th December 2019, they were entitled to Kshs 1,625,037.56/=:, which remained unpaid forcing them to file the current judicial review proceedings, for orders of *mandamus*.
7. After obtaining orders of *mandamus*, the respondents on two occasions expressed commitment to settle the decretal sum which stood at Kshs 2,296,034/= due to accrued interest and eventually deposited a sum of Kshs 1,318,328/= into the *Ex parte* Applicants bank account held at Co operative Bank (k) ltd leaving an outstanding balance of Kshs 977,706/= at as 18th July 2022. The 2nd respondent/ Applicant being the head of the county public service made her office a proper party to these proceedings pursuant to provisions of Section 44(3)(a) of the County Government Act. The warrants of arrest issued were therefore properly issued and they should be allowed to enforce the same to have this matter completely settled.
8. Further the *Ex parte* applicant/ respondent read bad faith and malice in the filling of this application as, the respondents had not opposed the initial application and deliberately failed to attend to this matter and only rushed to court to avoid enforcement of the orders issued. This showed bad faith and was a demonstration of indolence on the respondent’s part, which the court was urged not to Condon. The *Ex parte* Applicant urged the court to find that the 2nd respondent was a proper party to these proceedings and proceed to dismiss this instant Application with cost.

C. Determination

9. The *Ex parte* Applicant did file this judicial review proceedings seeking orders of *mandamus* to enable them enforce the initial judgment entered in their favour in Machakos civil suit No 284 of 2017, Capital Medical & Surgical Limited v Machakos county Government. The *Ex parte* Applicant was granted leave to file the substantive motion on 24th September 2020 and subsequently filed the motion dated 19th October 2020 on 21st October 2020. The same came up for hearing on 3rd November 2020, when it was granted as the same was not opposed, despite service being effect upon the respondents.



10. The *Ex parte* Applicant thereafter followed up on enforcement of the decree and eventually got warrants of arrest issued on 10th June 2022, hence this application. The 2nd respondent has not applied to set aside the *mandamus* orders issued as against her office on 3rd November 2021, and therefore has no “legs” the basis upon which she can seek to strike out the suit as against her office. The horse has bolted and the stable doors are closed. There is already judgment on record and the court is functus officio so to speak.
11. Secondly there is express admission of this debt and part payment has been made, by their conduct the respondents have accepted responsibility of the same and are estopped from turning away from their responsibility. They should ensure in the spirit of national values espoused under Article 10 of the *Constitution* do the right thing and settle the balance of the debt owned.

Disposition

12. The Application dated 29th June 2022 lacks merit and the same is dismissed with costs.
13. The costs thereof are assessed at Kshs 30,000/= all inclusive.
14. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 30th day of July, 2024.

In the presence of: -

No appearance for Appellant

No appearance Respondent

Susan/Sam Court Assistant

