



Republic v County Executive Committee Member In Charge of Finance County Government of Machakos & another; Access Kenya Group Limited (Exparte) (Judicial Review Application 283 of 2019) [2023] KEHC 17433 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION 283 OF 2019**

MW MUIGAI, J

MAY 11, 2023

**IN THE MATTER FOR APPLICATION FOR ORDERS OF
MANDAMUS BY ACCESSS KENYA GROUP LIMITED**

AND

**IN THE MATTER OF ARTICLES 22, 23 AND 47 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 3, 4 AND 7 OF THE FAIR
ADMINISTRATIVE ACTIONS ACT NO 4 OF 2015**

AND

**IN THE MATTER F ORDER 53 OF THE CIVIL
PROCEDURE RULES, THE LAW REFORM ACT CAP 25,
THE JUDICATURE ACT CAP8, LAWS OF KENYA AND
ALL OTHER ENABLING PRVISIONS OF LAW**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF
FINANCE COUNTY GOVERNMENT OF MACHAKOS 1ST RESPONDENT
COUNTY GOVERNMENT OF MACHAKOS 2ND RESPONDENT**

AND



RULING

1. Vide notice of motion application dated December 11, 2019 brought under section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act and section 5 (1) of the Judicature Act, the applicant sought the following orders, that;
 - a. This Hon court to order the county executive committee member for finance in the county government of Machakos, be committed to civil jail for contempt of court orders issued on August 13, 2019
 - b. Costs of this suit be borne by the respondents.
2. The application is supported by the affidavit of Moreen Mutuma, the legal officer of the *ex-parte* applicant who contends that the *ex-parte* applicant filed a plaint dated February 10, 2016 in Chief Magistrate's Court at Machakos civil case No 86 of 2016 and the 2nd respondent entered appearance in the matter on March 1, 2016.
3. The later filed statement of defense of April 4, 2016 which subsequently the *ex-parte* applicant filed a notice of motion dated July 21, 2016 seeking to strike the defense out for being filed out of time. The 2nd respondent upon service of the application, filed a chamber summons application dated October 31, 2016 seeking to amend the defense. The ruling on both applications was delivered on February 28, 2017 dismissing the chamber summons with costs and allowing/granting the notice of motion as prayed.
4. The applicant deposed that the decree was issued on June 5, 2017, they then filed a garnishee application dated August 28, 2017 which was declined on the basis that the garnishee proceedings were not sustainable. The respondents were served with a demand dated October 29, 2018 and the court decree that they have ignored. In addition, the applicant also obtained a certificate of order against county government dated May 29, 2019.
5. The applicant also obtained a court order issued on August 13, 2019 of *mandamus* directing the respondents to pay the applicant a sum of Kshs 6,979,241.72 plus interest there on from February 28, 2017 and costs of the suit in Chief Magistrate's Court at Machakos civil case No 86 of 2016 which was served upon the respondents.
6. It was contended that the finance executive, Hon Francis Maliti's actions of failing to make good payment of the decretal amount reek of impunity, arrogance and total disrespect to the court process and its orders. The *ex-parte* applicant stated that there was no stay or appeal and therefore there was no plausible reason why the orders have not been complied with. It was indicated that the *ex-parte* applicant suffered financial loss for more than two years and asked the court to grant the orders sought.
7. The respondents did not respond to this application despite being served as evidenced by the affidavit if service filed on July 28, 2020.

Determination

8. The court considered the application, the affidavit of service and the court record and the issue before this court is whether the *ex-parte* applicant is entitled to the orders sought or not.



Court Record

9. The matter commenced *vide* applicants *ex parte* chamber summons dated June 17, 2019 seeking leave for filing judicial review before Hon D.K Kemei J on June 17, 2019. leave was granted, the JR filed and served and on July 26, 2019 the trial court confirmed service *vide* affidavit of service filed on July 17, 2019 and in the absence of any appearance, representation or response, the same was considered unopposed and granted.
10. On July 28, 2020, the respondent was represented, appeared and sought indulgence to file response to the application and the hearing was scheduled to September 10, 2020.
11. On September 10, 2020, the respondent did not appear or respond and the court noted the date was obtained by consent of the parties. The application was unopposed and granted. The County Executive Committee Member for Finance Hon Francis Maliti [was] to appear in Court on October 6, 2020 and show cause why he should not be committed to civil jail for failure to comply with court orders of August 13, 2019, namely payment of Kshs 6,979,241.72/- plus interest. Hon Justice D. Kemei found the application to be unopposed and allowed the application as prayed. The court stated as follows;

“I find the same unopposed. The same is allowed as prayed. Summons are hereby issued to the County Executive Committee Member for Finance of Machakos Hon Francis Maliti to appear in this court on the October 6, 2020 to show cause why he should not be committed to civil jail for failing to comply with the orders dated August 13, 2019 namely the payment of Kshs 6,979,241.72 plus interest.”
12. On October 6, 2020, the applicant confirmed the orders were not served and matter was scheduled to October 26, 2020 on which date a new/fresh NTSC was issued. On December 2, 2020 the NTSC was served and since there was no appearance warrant of arrest was issued.
13. On June 14, 2021, the applicant informed the court that the principal sum was paid except for interest which the deputy registrar /taxing officer was to calculate.
14. On August 18, 2021, the ruling by Deputy Registrar /taxing officer of even date, the interest was calculated from February 28, 2017-February 3, 2021 & costs and came to Kshs 6,268,459.10/-
15. It is not in dispute that the respondents were served with the court order dated July 22, 2019 and issued on August 13, 2019 on August 14, 2019 as indicated by their respective stamps on a copy of the said order. It is also not disputed that the said application was filed and before the court.
16. The ruling dated August 18, 2021 by taxing officer, Deputy Registrar Hon E. Analo assessed the interest plus costs totaling to Kshs 6,268,459.20 and the matter was placed before this court for direction.
17. On September 21, 2022, the parties, informed this court that they were negotiating on mode of payment, were directed to file consent on payment of interest which was/is not disputed. A perusal of the court record indicates that none was filed and/or that parties failed to agree on the mode of payment.
18. It is not disputed that the amount of Kshs 6,979.241 being the decretal sum was paid to the applicant. What is yet to be paid is interest plus costs of Kshs 6,268,459.20. I find that the orders of Justice Kemei issued on August 13, 2019 have therefore been partly complied as far as the decretal sum is concerned.



19. As far as the issue of interest and cost is concerned, I find that the application herein had already been determined when the application was allowed as prayed and warrants of arrest issued.
20. This court on September 21, 2022, took judicial notice of the change of guard in the county government following the General elections in August 2022, the County Government through counsel Ms Muhia, informed this court that there was/is a new team in office and required 90 days to put its house in order. The court granted 60 days.
21. On November 22, 2023 & February 8, 2023 no appearance, response or representation was forthcoming from the respondent.

Contempt Of Court

22. Section 5 of the *Judicature Act*, cap 8 which provides:-

(1)

The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

23. In the case of *Cecil Miller v Jackson Njeru & another* [2017]eKLR where the Njuguna, J. stated:-

“As to whether the respondent is guilty of contempt of court, the element of a civil contempt as espoused in a book titled “*Contempt in Modern New Zealand*, were set out as follows:

- a) The terms of the order (or injunction or undertaking were clear and unambiguous and were binding on the defendant.
- b) The defendant had knowledge of or proper notice of the terms of the order.
- c) The defendant has acted in breach of the terms of the order; and.
- d) The defendant conduct was deliberate..”

24. These principles applied to the instant case, the application before court on contempt of court is spent /overtaken by events because, whereas Machakos county government /respondent herein is indebted to the exparte applicant on interest & costs of Kshs 6,268,459.20/- the contempt by county executive committee member for finance of Machakos Hon Francis Maliti is overtaken by the new team inaugurated in office following general elections in 2022. Therefore holding him responsible of being in breach of the court order and his conduct deemed to be deliberate would be futile if he is no longer in office.

Execution

25. From the chronology of events pertaining to the instant matter, what commenced as judicial review and contempt of court application have been overtaken by events upon payment/settlement of the principal amount. The issue of interest and costs remained pending and was resolved *vide* the ruling of taxing officer of August 18, 2021.
26. The ruling on interest and costs remains a valid order/decreed of the court and the debt incurred by the respondent and default of payment of the same by the respondent attracted the interest and costs in favor of the applicant. The amount of interest and costs remains owing by the Machakos county government. The issue of service is spent as the court record confirms that the respondent is and has



been aware of the same and asked for time to familiarize and regularize the same. In the absence of any response, action, appearance or representation, the issue of interest and costs is subject to execution.

27. The right to commit a judgment-debtor to civil jail is provided for under section 38 of the [Civil Procedure Act](#), cap 21, which provides for powers of the court to enforce execution. It is provided that:

“Subject to such conditions and limitations as may be prescribed, the court may, on application of decree holder, order execution of the decree –

- (a) by delivery of any property specifically decreed,
- (b) by attachment and sale, or by sale without attachment of any property,
- (c) by attachment of debts
- (d) by arrest and detention in prison of any person
- (e) by appointing a receiver or
- (f) in such other manner as the nature of relief granted may require.

Provided that where the decree is for payment of money, execution by detention in prison shall not be ordered unless after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing is satisfied –

- (a) that the judgment-debtor with the object or effect of obstructing or delaying the execution of the decree –
 - (i) is likely to abscond or leave the local limits of the jurisdiction of the court or
 - (ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property.
- (b) That the judgment-debtor has or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which by or under any law, or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree, or
- (c) That the decree is for a sum of money which the judgment debtor was bound in a fiduciary capacity to account...”

28. Order 22 [CPR](#) 2010 amplifies the processes and procedures of implementing execution of court orders and decrees. That being the case, the applicant may invoke any/either of the processes to enforce payment of the decretal amount against the respondent. The new team in office is aware of the debt due and owing and in the absence of appearance, representation or any proposals on settlement of the debt this court grants following orders;



Disposition

- a) the application for contempt of court application is spent/overtaken by events.
- b) the outstanding interest and costs Kshs 6,268,459.20/- remains due and owing against the respondent in favour of the exparte applicant.
- c) In light of the incoming members of the county committee members, the county executive committee member for finance of Machakos county government currently shall negotiate, give proposals on payment schedule and /or make part payments within 90 days from the date of ruling.
- d) In default, NTSC shall issue to the county executive committee member for finance of Machakos county government currently in office on a mention date before the court through DR/MHC on July 26, 2023. The applicant to serve the other party.

DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 11/5/2023 (VIRTUAL/ PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. KIMANI - FOR THE APPLICANT

NO APPEARANCE- FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT (S)

