



Lirona Construction Limited v Maliti (Sued as the then County Executive Committee Member, Finance & Economic Planning- Machakos County Government) & another (Miscellaneous Application 16 of 2020) [2023] KEHC 22433 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 16 OF 2020
FR OLEL, J
SEPTEMBER 21, 2023**

BETWEEN

LIRONA CONSTRUCTION LIMITED EXPARTE APPLICANT

AND

FRANCIS MALITI (SUED AS THE THEN COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE & ECONOMIC PLANNING- MACHAKOS COUNTY GOVERNMENT) 1ST RESPONDENT

GRACE MUNGUTI (SUED AS THE COUNTY SECRETARY OF MACHAKOS COUNTY GOVERNMENT) 2ND RESPONDENT

JUDGMENT

Introduction

1. The exparte applicant/Respondent had filed proceedings as against the county Government of Machakos and following successful mediation process they obtained a decree in their favour for the sum of Kshs 8,824,690/= in Machakos CMCC No 718 of 2017; Lirona Construction Limited Vrs Machakos Government and the county secretary of Machakos county Government.
2. Further the exparte applicant did institute this judicial review proceedings and the court did on September 24, 2020 issued an order of Mandamus compelling the Respondents to pay the afore-stated sum together with all accruing interest accrued at court rates arising out of the court decree dated November 4, 2020 issued in Machakos CMCC No 718 of 2017; Lirona Construction Limited Vrs Machakos Government and the county secretary of Machakos county Government.
3. When pressed for payment, the Respondents filed an application dated April 20, 2022 seeking for accounts to be taken and they be granted more time to settle the decretal sum based on the said



reconciled accounts. Vide a ruling dated October 18, 2022 the said application was allowed and the Honourable Judge did direct that;

- a. The parties do within 10 days of the said decision, agree on and appoint an independent accountant to take accounts between them and file his/her report within 45 days from the date of his appointment.
 - b. In default of such an agreement each party to appoint an accountant and the two appointed accountants to appoint an umpire and the three to go through the documents in possession of the parties and prepare a report for filing in this matter within 45 days of the appointment of the umpire.
 - c. Where the parties agree on one accountant his/her costs will be shared equally by the parties. Where one party does not cooperate in the process of appointment of the accountant, the report of the accountant appointed by the other party shall be filed for consideration by the court.
 - d. However, where three accountants are appointed each party will bear the costs of his accountant, while the costs of the umpire will be shared equally by the parties.
 - e. Further orders were to await filing of the said Report.
4. Pursuant to the said Order/directions issued by court, the Ex parte Applicant did file their accounts report dated 18th January 2023 wherein it was indicated that they had been paid a sum of Kshs 2,713,395.45 leaving a balance of Kshs 6,111,294.55/=. The Respondents/ applicants despite being given several opportunities by the court failed to file their statement of accounts in court to show what they disputed and/or had paid the Ex parte applicant and had not been considered.
5. The Respondents/applicants had the legal burden to prove that they had paid the Ex parte applicant a substantial part of the decretal sum and/or that they had paid the entire decretal sum. By failing to provide proof of payment, they have obviously failed to discharge the legal and evidentiary burden placed on them by section 107 and 108 of the Evidence Act, Cap 80 laws of Kenya. This application thus fails.

Disposition

6. I do find that the Respondent owes the *ex parte* applicant a sum of Kshs 6,111,294.55/ arising from the decree issued in Machakos CMCC No 718 of 2017 Lirona Construction Limited Vrs Machakos county Government and the county secretary of Machakos county Government and the same will be paid with interest at court rates as stipulated in the said decree dated November 4, 2019.
7. The application dated April 20, 2022 is hereby dismissed with costs to the *ex parte* Applicant and the same is assessed at Kshs 30,000/=.
8. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

