



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
JUDICIAL REVIEW NO. 25 OF 2012

REPUBLIC.....APPLICANT

-VERSUS-

JOSEPH ROTICH BOIT.....1ST RESPONDENT

UASIN GISHU COUNTY GOVERNMENT.....2ND RESPONDENT

COUNTY SECRETARY UASIN GISHU.....3RD RESPONDENT

JULIUS KIPKOECH KOSGEI.....EX PARTE APPLICANT

JUDGMENT

1. The *ex parte* applicant prays for an order of *mandamus* to compel the 2nd respondent to pay a sum of Kshs 227,452 together with interest and costs. He prays that the 3rd respondent makes the payment within seven days of the grant of the writ. There is also a prayer for costs.
2. On 9th November 2012, the *ex parte* applicant obtained leave to apply for an order of *mandamus*. The substantive notice of motion was filed on 20th November 2012. It is instructive that two of the respondents were the *Municipal Council of Eldoret*; and, the *Town Clerk* of the council respectively. On 5th December 2013, the *ex parte* applicant was granted leave to amend the substantive motion to replace the two respondents with their successors. The substitution was to be made within *seven days*.
3. The amended notice of motion is dated 26th June 2015 and filed the same day. It is supported by an affidavit sworn on even date; and, the earlier statement of facts dated 8th November 2012 filed together with the application for leave. There is also a verifying affidavit sworn by the *ex parte* applicant.
4. The gravamen of the motion is that the *ex parte* applicant was awarded special damages of Kshs 227, 452 against the Municipal Council of Eldoret in Chief Magistrates Court in Eldoret CMCC 614 B of 2008. Those matters are buttressed at paragraphs 2 to 8 of the supporting affidavit sworn on 26th June 2015. The claim in the lower court was for negligence. The court found that on 20th March 2008, the respondents' motor vehicle registration KAW 758Z was driven negligently; and, it collided with the *ex parte* applicant's vehicle registration KBA 002K. Judgment was entered for Kshs.227, 452 less 20% contributory negligence. The *ex parte* applicant was also awarded interest and costs. A copy of the decree is annexed marked "JKK2". Despite notice of the decree, payment has not been forthcoming. That triggered this action in judicial review.
5. The application is contested by the 2nd and 3rd respondents. There are grounds of opposition dated 26th

April 2016. The respondents contend that the application is incompetent and an abuse of process; and, that the prayers are unmerited because there is a variance between the decree and the sums pleaded in the application for leave.

6. On 26th April 2016, I heard oral arguments from learned counsel for the parties. I have considered the pleadings, depositions, documentary evidence and the rival submissions.

7. I am satisfied that the *ex parte* applicant was granted leave on 9th November 2012. The leave was however in the in the following terms: “*that leave do issue to apply for an order of mandamus to compel the respondents to pay the decretal amount awarded to the ex parte applicant as per the decree issued inclusive of costs and interest all coming to Kshs 414, 232*”. The amended substantive motion prays first for “*an order of mandamus to compel the respondents to pay the applicant the sum of Kshs 227, 452 together with costs and interest of the suit*”. There is a second prayer that “*the county secretary, Uasin Gishu County Government to effect the same within seven days from the date of issue of the said order*”. It is clear beyond peradventure that the substantive *amended notice of motion* is at great variance with the leave granted. To that extent, the substantive motion is incompetent.

8. This is *not* a simple technicality. Even on the merits, the *ex parte* applicant was awarded Kshs 227, 452 *less 20% contributory negligence*. The *ex parte* applicant was silent in the application for leave; and, in the substantive motion about the contributory negligence. I am alive that the figure in the original decree has risen because of interest and costs. The point is that when the *ex parte* applicant sought leave, he claimed the higher figure of Kshs 414, 232. In the subsequent motion, he has reverted to the original sum of Kshs 227, 452 without any mention of contributory negligence. In the process, he has shot himself in the foot: it is no longer *certain* the amount now due from the respondents.

9. The amended notice of motion is also incompetent for another reason: it was filed *out of time*. The substantive notice of motion was *originally* filed on 20th November 2012. That was well within the twenty one days provided by Order 53 rule 3. It is instructive that two of the respondents then were the *Municipal Council of Eldoret*; and, the *Town Clerk* of the council respectively. On 5th December 2013, the *ex parte* applicant was granted *leave* to amend the substantive motion to replace the two respondents with their successors. The court ordered that the substitution be made within *seven days*. The *amended notice of motion* is dated 26th June 2015 and was filed the same day. That was a *year and a half* later. I have carefully studied the record. There was no order for extension of time; or, consent to that effect. It follows as a corollary that the amended notice of motion was presented out of time.

10. For all those reasons, the amended notice of motion dated 26th June 2015 is on a legal quicksand. It is hereby dismissed. Costs follow the event and are at the discretion of the court. In the interests of justice; and considering the predicament the *ex parte* applicant finds himself in; I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 19th day of May 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open Court in the presence of:-

Mr. Chebii for the *ex-parte* applicant instructed by Chebii & Company Advocates.

No appearance for the 1st respondent.

Ms. Odwa for Mr. Mathai for the 2nd and 3rd respondents instructed by Gicheru & Company Advocates.

Mr. J. Kemboi, Court Clerk.