



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO. 37 OF 2011

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN
THE NATURE OF JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS DIRECTED TO
THE TOWN CLERK, MIGORI MUNICIPAL COUNCIL**

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 265 LAWS OF KENYA

BETWEEN

JAMES MAJIWA SAITA T/A JAMASAI

RENOVATORS AND GENERAL CONTRACTORS

..... APPLICANT

VERSUS

MIGORI MUNICIPAL COUNCIL

..... RESPONDENT

RULING

1. By the Notice of Motion dated 31st March, 2011, the applicant prays for ORDERS:-

1. *That an order of Mandamus be granted to the applicant to compel the respondent to satisfy the decretal sum together with the certificate of costs issued on 7th July 2010 and 29th March 2011 respectively and pay the sum amounting to Kshs.15,989,661.10/= being full and final settlement.*

2. *That costs of and incidental to the application be provided for.*

2. The Notice of Motion is supported by the Statutory Statement dated 31st March 2011, the Verifying Affidavit sworn by James Majiwa Saita,

the applicant herein and the annexures to the Verifying Affidavit. From the above stated documents, the facts of this case are that the applicant herein obtained judgment against the respondent in Kisii HCCC No. 13 of 2005 as per the court order dated 22nd April 2010. Subsequently the decree dated 7th July 2011 and the certificate of costs issued on 29th March 2011 were obtained. The applicant says that despite calls upon the respondent to make good the decree, the respondent has refused to do so, hence these proceedings.

3. A copy of the decree and the certificate of costs plus copies of various correspondence sent to the respondent's advocates were annexed to the applicant's verifying affidavit. The applicant says that there is no good cause why the respondent had not paid the decretal sum and prays for the orders sought.

4. The application is opposed vide the Notice of Preliminary objection dated 24th June 2011 and filed in court on 3rd October 2011. The respondent contends that the application by way of Notice of Motion which it seeks to enforce or execute a decree of the court, is incompetent by dint of the provisions of **sections 34** of the **Civil Procedure Act** and **section 263 A** of the **Local Government Act**. The Respondent also says that an order of mandamus does not lie when there is a convenient and sufficient remedy of execution by way of Notice to Show Cause.

5. The applicant swore a Supplementary Affidavit dated 21st October 2011 and an Answer to the respondent's Preliminary Objection in the following terms:-

“1. Section 263A of the Local Government Act does not allow attachment of a local Authority’s goods and thus an application for Judicial Review for order of Mandamus to compel payment is the means open to the Decree holder to enforce payment of the Decretal sum.

2. The objection is not supported by Article 159 (2) (d) of the Constitution of Kenya

3. There is no other convenient and sufficient remedy as alleged for:-

a) As per the annexures and correspondences attached to our Supplementary Affidavit, the judgment debtor has neglected to satisfy the Decree and Certificate of Costs despite numerous exhortations and reminders over a long period of time.

b) They have equally declined to pay Kshs.377, 570/= as per the Certificate of Costs issued on the 29th of March, 2011 which was taxed for the said sum by consent.”

6. The applicant also filed some skeleton submissions supported by a number of relevant authorities all pointing to the fact that the only way open for the applicant in this matter is to proceed by way of Judicial

Review in the nature of mandamus. The applicant contends that having obtained leave of the court to commence these proceedings, there was nothing in the same to render the application incompetent or inconvenient. Among the authorities cited by the applicant are the cases of **National Housing Corporation –vs- Nairobi City Council & another [2004] 1 KLR 767; Njuki & 4 others –vs- Republic [2002] 1 KLR 771; and Republic –vs- The Town Clerk, Municipal Council of Mombasa [2010] e KLR.**

7. I have carefully read all these authorities in which the law is correctly stated to the effect that an order of mandamus is the only avenue by which decree holders who seek recoveries from local authorities can use to make such recoveries. This is in line with the provisions of **section 263A** of the **Local Government Act** which provides as follows:-

“263A. Notwithstanding anything to the contrary in any law –

(a) where any judgment or order has been obtained against a local authority, no execution or

attachment or process in the nature thereof shall be issued against the local authority or against the immovable property of the local authority or its vehicles or its other operating equipment, machinery, fixtures or fittings, but the clerk of the local authority shall, without delay, cause to be paid out of the revenue of the local authority such amounts as may, by the judgment or order, be awarded against the local authority to the person entitled thereto;

(b) no immovable property of the local authority or any of its vehicles or its other operating equipment, machinery, fixture or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the clerk of the local authority.”

8. In the premises, I allow this application and order that an order of mandamus do issue to compel the Town Clerk of Migori Municipal Council to settle the decree in Kisii HCCC No.131 of 2005 as per the court's order dated 22nd April 2010. Costs of this application to the applicants.

9. It is so ordered.

Dated and delivered at Kisii this 16th day of March, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s Oluoch Awino for Applicant

Mr. G.M. Nyambati for P.J. Otieno for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.