



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW NO. 23 OF 2010

JOHN KIRAGA NJUGUNA:::APPLICANT

VERSUS

**THE TOWN CLERK MUNICIPAL COUNCIL
OF ELDORET:::RESPONDENT**

JUDGMENT

On 21st July, 2010, **Mwilu J.** granted to the applicant leave to apply for an order of mandamus compelling the **Town Clerk Municipal Council of Eldoret**, the respondent to pay the applicant the decretal amount, costs and interest decreed in his favour in Eldoret CMCC NO. 839 of 2006 in which the applicant was the plaintiff and the respondent and one **Modestus Wabwire Omondi** were defendants.

Pursuant to the leave, the applicant lodged this Notice of Motion on 11th August, 2010 seeking the said relief. The main grounds for the application are that the applicant obtained judgment against the respondent and the said **Modestus Wabwire Omondi** in the said case in the sum of Kshs. 295,323/- plus costs and interest; that costs were, by consent, assessed a Kshs. 75,000/- and a decree issued on 15th October, 2009; that the respondent is enjoined to settle their said sums but has refused and/or ignored to do so hence this application.

There is a supporting affidavit which elaborates the above grounds. Annexed to the said affidavit are copies of the decree sought to be enforced and previous attempts to execute the same decree.

The application is opposed by the respondent and there is a replying affidavit sworn by **Stanlas Ondimu**, the Town Clerk. It is deponed in the affidavit, *inter alia*, that the judgment entered against the respondent is being challenged in Civil Appeal No. 39 of 2009 which is pending determination; that because of the pending appeal the applicant is not entitled to seek the relief sought herein and the respondent would seek to stay these proceedings; and that the application is incompetent.

The parties filed written submission with the leave of the court. The submissions reiterate the stand-points taken by the parties in their respective pleadings.

I have considered the application; the pleadings filed and the submissions of counsel. I have also given due consideration to the authorities cited to me. Having done so, I take the following view of this matter.

The applicants' case is simple and straight forward. It is that he sued the Municipal Council of

Eldoret in Eldoret CMCC NO 839 of 2006 and succeeded. He was awarded Kshs. 295,323.00 plus costs and interest. Costs were assessed, by consent at Kshs. 75,000/- and a decree subsequently issued. The said sum remains unpaid and efforts to recover the sum have yielded no useful results. In the premises, he resorted to this mode of enforcement.

The respondent's case is also simple and straightforward. He says the said judgment is being challenged on appeal and cannot be the subject of this Judicial Review Proceedings. It even threatened to apply to stay these proceedings.

An order of mandamus compels a public body or person to perform a duty imposed upon it or him by law where the public body or person has refused to perform the duty. The respondent is required by Law to settle decrees issued against the Municipal Council of Eldoret. The applicant has previously sought settlement of the said decretal sums plus costs and interest without success. To my mind he was entitled to move this court by way of the judicial review order of mandamus. It is not an answer, in my view, that there is a pending appeal. If the respondent desired to stay execution there are known provisions for that. If it also desired to stay these proceedings there are known provisions for the same.

There is therefore no impediment to the granting of the relief sought. The applicant, in my view, is entitled to the relief sought. An order shall therefore issue as prayed in paragraph 1 of the Notice of Motion. The respondent shall pay the costs of the Notice of Motion.

Orders accordingly.

DATED AND DELIVERED AT ELDORET

THIS 5TH DAY OF AUGUST, 2011

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Barasa H/B for Mr. Gicheru for the Respondent

**F. AZANGALALA
JUDGE**

5TH AUGUST, 2011