



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

Misc Civil Appli 221 of 2003

REPUBLIC..... APPLICANT
(EXPARTE) ELPHAS KIPRUGUT KOECH APPLICANT

-VERSUS

PERMANENT SECRETARY

MINISTRY OF INTERNAL SECURITY 1ST RESPONDENT
COMMISSIONER OF POLICE 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

RULING

Before me is an application by way of Notice of Motion dated 13th May 2004 said to have been brought under Order 53 rule 1(1) and (2) of the Civil Procedure Rules and section 8 and 9 of the Law Reform Act (Cap.26). The application was brought pursuant to leave granted by this court on 29th April 2004. The application was filed on 19th May 2004. It seeks for –

- 1. An order of judicial review in the nature of mandamus to compel the respondents to satisfy the decree amounting to Kshs.250,000/= plus costs of Kshs.59,787/= and interest obtaining in the applicants favour in ELDORET CMCC. NO. 71 OF 2002 (ELPHAS KIPRUGUT KOECH –VS- JOHN SONGOR AND THE ATTORNEY GENERAL).**
- 2. That costs of the application be provided for**

The application has grounds on its face. It is supported by the supporting affidavit of Elphas Kiprugut Koech the applicant herein sworn on 19th May 2004. When the application came up for hearing on 11th December 2004 and on 8th February 2005, Mr. Rotich State Counsel appeared on behalf of the Attorney-General and the other respondents who are the Permanent Secretary Ministry of Internal Security and the Commissioner of Police. However on the 10th May 2005 when the matter came up for hearing, nobody appeared in court on behalf of the Attorney-General and the other two respondents, though the Attorney-General’s office was served with a hearing notice and they acknowledged receipt of the same with a stamp and signature on 4th March 2005.

The grounds of the application are that the applicant was the successful litigant against the respondents in Eldoret CMCC. No.71 of 2002 and had a decree in his favour.

Secondly that the respondents had not honoured the decree despite notice to do so. That the decretal sum was payable against the exchequer as no execution by way of attachment could proceed against the government. Fourthly, that it was in the interests of justice that an order of mandamus do issue to compel the respondents to perform their statutory duty by paying the applicant the decretal sum, costs and interest.

Though the Attorney-General appeared twice in court through Mr. Rotich, State Counsel, they never filed any papers in opposition to the application. At the hearing of the application, Mr. Ngigi Mbugua for the applicant submitted that the applicant was seeking for orders of mandamus to compel the respondents to satisfy the decree and costs in their official capacities. The applicant obtained a money decree against the Attorney-General and Songor who was an employee of the government. The decree was signed on 12th May 2003. The said decree had not yet been satisfied and the applicant could not, in law, levy execution against the Government. Therefore the applicant had come to court for assistance through this application for judicial review.

The applicant was seeking to compel the exchequer to satisfy the decree. That the court should compel the respondents to perform their statutory duty. He urged the court to grant the orders prayed, as the respondents had not even filed any response to the application.

This is an application to compel Government officials to satisfy a money decree issued by the court as well as costs awarded by the court. Judgement herein was entered by the Eldoret Chief Magistrate, Solomon Wamwayi, Esq. On 27th February 2003 against John Songor and the Attorney-General for Kshs.250,000.00 plus interest and costs. Notice of entry of judgement was issued on the Attorney-General on 29th March 2003. Costs were later on 25th April 2003 assessed by the same learned Chief Magistrate. On the date of entering judgement and the date of assessing costs, both defendants were not present.

The Civil Procedure Rules under Order XXVIII rule 2(2), prohibits the issuance of execution against the Government. The said rule provides –

“2(2) No order against the Government may be made under –

Order XIII, rule 4 (impounding of documents);

Order XXI (execution of decrees and orders);

Order XXII (attachment of debts); and

Order XL (appointment of a receiver)”.

As there is prohibition against making orders for execution of decrees against the Government, the plaintiff has come to this court through the judicial review procedure under Order LIII of the Civil Procedure Rules and section 8 and 9 of the Law Reform Act (Cap.26). He has annexed a copy of the decree for Kshs.258,950/= issued by the court on 12th May 2003. That amount is the Kshs.250,000/= awarded by the court plus costs up to that time of Kshs.8,950. Also annexed is a certificate of costs issued on the same date of 12th May 2003 for Kshs.59,787/=.

This court has powers to issue an order of mandamus to compel a public authority or a public officer to perform his lawful duty under the provisions of section 8(2) of the Law Reform Act (Cap.26). The decree herein was obtained before the learned Chief Magistrate and a certificate of costs obtained. This application was served on the Attorney-General. Though at one time Mr. Rotich State Counsel appeared in court, the Attorney-General has not objected or filed any papers in this application. If he wanted to oppose the application the Attorney-General should have filed necessary papers in court. In those circumstances, I am constrained to allow the application and order as follows –

- 1. An order of mandamus be and is hereby issued to compel the respondents herein to satisfy the decree amounting to Kshs.250,000/= plus costs of Kshs.59,787/= and interest obtaining in the applicant’s favour in Eldoret Chief Magistrate’s Court Civil Case No.71 of 2002 (Elphas Kiprugut Koech –vs- John Songor &The Attorney-General).**
- 2. The applicant/plaintiff will have the costs of this application.**

Dated and delivered at Eldoret this 5th day of July 2005.

George Dulu
Ag. Judge

In the Presence of: Mr. Ngigi Mbugua for the applicant