



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL SUIT NO. 10 OF 2015**

**BETWEEN**

**JIMAI ELECTRICAL SERVICES LIMITED.....PLAINTIFF/ APPLICANT**

**AND**

**COUNTY GOVERNMENT OF MERU.....DEFENDANT/ RESPONDENT**

**RULING**

- 1) By a judgment dated 23<sup>rd</sup> May, 2018, this court ordered Defendant/Applicant to the Plaintiff/Applicant the sums of Kshs. 12,182, 820/- together with interest at court rates from the date of filing of the suit and costs of the suit.
- 2) A bill of Applicant's costs was taxed at Kshs. 500,951/- and subsequently, the Plaintiff/Applicant paid a sum of Kshs. 17,203,797/- to the Applicant.
- 3) By a ruling dated 28<sup>th</sup> October, 2020, the court found that the Applicant had been overpaid and ordered it to refund Kshs. 1,058,513/- to the Plaintiff/Applicant.
- 4) By a notice of motion dated 11<sup>th</sup> November, 2020 filed on 18<sup>th</sup> December, 2020, supported by an affidavit sworn on 11<sup>th</sup> November, 2020 by James Kariuki Githinji, the Plaintiff/Applicant's Managing Director, Applicant seeks an order of review of the orders issued on 28<sup>th</sup> October, 2020 on the following grounds **THAT**:

**1) There is an error apparent on the face of the record**

**2) That the court deducted Kshs. 2,849,167.76 from the total amount owing to the Applicant instead of Kshs. 939,389/- paid by the Plaintiff/Applicant as withholding tax**

**3) That after deducting a sum of Kshs. 939,389/-, the sum owed to the Plaintiff/Applicant is Kshs. 851,265.76 and not Kshs. 1,058,513/-**

5) The motion is opposed on the basis of a replying affidavit sworn on 05<sup>th</sup> February, 2021 by Rufus Miriti, the Defendant/Respondent's County Secretary. He contends **THAT**:

**1) There is no an error apparent on the face of the record**

**2) That the court holding that Kshs. 2,849,167.76 withholding tax deductible from the principal sum and costs was correct, logical and legally sound**

**3) That the application has no merit**

**Analysis and Determination**

5) I have considered the notice of motion dated 11<sup>th</sup> November, 2020 filed on 18<sup>th</sup> December, 2020 in the light of affidavits on record and

submissions filed on behalf of the Applicant.

- 6) I have also considered the court ruling dated 28<sup>th</sup> October, 2020, to determine if there is indeed an error as contended by the Applicant.
- 7) The issue in question is whether the applicant has satisfied the threshold for grant of an order of review. Order 45 of the Civil Procedure Rules which as follows:

**1. (1) Any person considering himself aggrieved-**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

8. In the case of *National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*, the Court of Appeal stated: -

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”**

- 8) At paragraph 16 of the ruling dated 28<sup>th</sup> October, 2020, the court rendered itself as follows:

***[16] The decretal sum stood at Kshs. 18,142,187/- on 03<sup>rd</sup> October, 2018. The Court issued a warrant of arrest in execution. The amount payable at the time was Kshs. 18,360,386/-. The Defendant settled the decretal sum as follows; on 1/2/2019 Kshs. 16,296,688/-; on 16/2/2019 Kshs. 907,109/-. The Defendant has only confirmed payment of Kshs. 939,389/- and this is the amount I wish to deduct as withholding tax as opposed to 15% on the principal sum and costs. (Emphasis added).***

- 9) From the foregoing, it was clear to the mind of the court that only Kshs. 939,389/- and this is the amount I wish to deduct as withholding tax as opposed to 15% on the principal sum and costs.

- 10) At paragraph 17 of the ruling, however, the court deducted Kshs. 2,849,167.76 and not Kshs. 939,389/- it had proposed to deduct at paragraph 16.

- 11) From the foregoing, I am persuaded that the error/omission apparent on the face of the record in this matter is self-evident and does not require no elaborate argument to be established. I find that the Plaintiff/Applicant has satisfied the threshold for review of this court's order dated 28<sup>th</sup> October, 2020.

- 12) In the end, the notice of motion dated 11<sup>th</sup> November, 2020 and filed on 18<sup>th</sup> December, 2020 has merit and it is hereby ordered **THAT:**

**1) This court's order dated 28<sup>th</sup> October, 2020 is reviewed to the extent that the amount deductible as withholding tax is Kshs. 939,389/- as opposed to Kshs. 2,849,167.76**

**2) The amount due to the defendant/Respondent is therefore Kshs. 851,265.76 as opposed to Kshs. 1,058,513/-**

**3) Since the error/omission was on the part of the court, each party shall pay its own costs**

**DATED IN MERU THIS 20<sup>th</sup> DAY OF May 2021**

**T.W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For Plaintiff/ Applicant - Mr. Gitonga for M/S J.G. Gitonga & Co Advocates**

**For Defendant/Respondent - Mr. Mutinda h/b for Mr. Ayieko for M/S Laichena Mugambi & Co Advocates**