REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HIGH COURT CIVIL CASE NO.14 OF 2015

NICE RICE MILLERS LIMITED..PLAINTIFF/RESPONDENT

VERSUS

MERU COUNTY GOVERNMENT..DEFENDANT/APPLICANT

R U L I N G

1. On 17th December 2018, this Court granted a stay of execution of its judgment and decree dated 20th September 2018. However, there was a condition that the applicant was to deposit the decretal sum of Kshs.134,145,234/70 in an interest bearing account in the joint names of the advocates on record for the parties within 30 days of the date of the ruling. In exercising its unfettered discretion, it also granted the applicant the extension of time for filing the notice of appeal against its judgment aforesaid.

2. The applicant has now come back seeking the review of the said ruling and for the setting aside the requirements for the deposit of the sum of Kshs. 134,145,234/70. The grounds upon which the application was grounded were set out in the body of the Motion and the supporting affidavit. These as the grounds which **Mr. Kibanga,** Learned Counsel for the applicant reiterated in his submissions.

3. **Mr. Kibanga** submitted that there was no budgetary allocation for such a colossal sum. That according to ***section 134 of the County Government Act, 2012*** as read with ***section 129 of the Public Finance Management Act, 2012,*** there has to be County plans which forms the basis for budgeting and spending by the applicant. That these have to be approved by the County Assembly.

4. Counsel further submitted that it has become trite law that County governments enjoy the same privilege as the National Government when it comes to legal processes. That in the premises, the requirement for the deposit of security should not apply to the applicant. Finally, Counsel submitted that the issue is of public importance and it should therefore be exercised in favour of the applicant.

5. The respondent opposed the application based on the replying affidavit of 14th March, 2019. It contended that the application was incompetent, bad in law and an abuse of the process of the court. That the applicant had been given ample time to deposit the decretal sum and only came to court after being served with a Judicial Review application.

6. It was further contended that the issue of budgetary allocation had already been determined and it was therefore *Res judicata*. That the application that gave rise to the impugned ruling had also sought leave to file an appeal out of time. In the premises, the court was urged to infer a thread of bad faith on the part of the applicant. That the application therefore lacked merit and was only meant to delay the execution of the matter.

7. ***Order 45 of the Civil Procedure Rules*** and ***section 80 of the Civil Procedure Act*** give this court jurisdiction to review its own orders and rulings. In ***Nuh Nassir Abdi Vs Ali Wario & 2 Others (2013) eKLR***, the court held that a decision whether or not to vary, set aside or review earlier orders is an exercise of judicial discretion and the court ought only to exercise such discretions if to do so would serve a useful purpose.

8. From the outset, I should point out that I was not impressed with the respondent's replying affidavit. The respondent broke all known rules of swearing an affidavit by setting out in extensor matters of law in paragraph 9. That in my opinion is not allowed. Matters of law and submissions have no place in affidavits. And affidavit is supposed to contain facts on which one's case relies on. In this regard, that paragraph was offensive and cannot be allowed to stand, I hereby strike it out.

9. The issue for consideration is whether the application satisfies the provisions of ***Order 45 of the Civil Procedure Rules.*** It was not clear from the application on which limb the applicant's application was hinged on; whether it is an error apparent on the record; or whether it was discovery of new evidence or it is for any other reason.

10. I will however consider keenly the applicant's contention to be able to place it within the parameters of ***Order 45 (1) of the Civil Procedure Rules.*** It was the applicant's contention that the court erred in ordering the giving of security while the applicant was a county government, yet it enjoys privilege as the central government from being required to give security for stay of execution.

11. This this contention is made on the basis that this court erred in a matter of law that, a County Government is akin to the Central Government and should not be made to give security in exchange for a stay of execution. This to my mind is an error of law and its place is to appeal against the decision not to review the same. See **National Bank of Kenya v. Ndungu Njau [1997] eKLR** where the Court of Appeal held:-

> ***"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. … 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 ground for review".***

12. In this regard, that ground cannot be a ground for review of the impugned ruling.

13. It was the applicant's further contention that under the law, the applicant would not be able to comply with the order for deposit of security because of budgetary constraints. While I am alive to the fact that the applicant's operations are subject to strict budgetary regulations, However, as a prudent body corporate, a county government must provide for bills in its budget. The applicant did not indicate whether its allocation for settlement of bills or decrees was provided for and had been exhausted.

14. Further, the contention that this item was not provided for in the current budget, I did not understand the applicant asking for more time to provide for the said amount in its forthcoming budget.

15. To my mind, this is a contention between public interest that a county government should be given an opportunity to budget for claims, vis a vis the application of ***the National Values and Principles of governance in Article 10 of the Constitution.*** Under that *article,* some of the national values is the ***rule of law, good governance and accountability.*** A lawful judgment should never be made to be a paper judgment.

16. This court granted the applicant leave to appeal to the Court of Appeal against the impugned judgment. When the applicant found that the conditions set by this court for the grant of stay were ominous, it should have appealed to that court. To my mind, I see no good ground by which I should revisit the impugned decision.

17. As regards the alternative prayer for leave to appeal to the court of appeal against the impugned ruling, that order cannot be available to the applicant. ***Order 45 of the Civil Procedure Rules*** is clear that, once a party has pursued a review process, he cannot at the same time appeal. Accordingly, granting the said order will be against the law as this as a decision being made on a review.

18. Accordingly, the application is without merit and the same is hereby dismissed with costs.

It is so ordered.

DATED and DELIVERED at Meru this 23rd day of May, 2019.

A. MABEYA

JUDGE