



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 531 of 2004**

**JACKSON WAHOME NGATIA. .... RESPONDENT/PLAINTIFF**

**VERSUS**

**AGRIDUT (K) LIMITED. .... 1<sup>ST</sup> APPLICANT/DEFENDANT**

**SAMUEL WANJOHI KIMUYU. .... 2<sup>ND</sup> APPLICANT/DEFENDANT**

**KIRINYAGA CONSTRUCTION. .... 3<sup>RD</sup> APPLICANT/DEFENDANT**

**R U L I N G**

The application before the court is the Notice of Motion dated 3<sup>rd</sup> October, 2012. It seeks a review and varying of this court's orders dated 26<sup>th</sup> September, 2012. It also sought that another Notice of Motion dated 26<sup>th</sup> September, 2012, seeking, inter alia, leave to appeal out of time, injunctive orders restraining Respondent from completing execution process already in progress and, staying of execution of a decree issued by the court on 21<sup>st</sup> September, 2012 pending the determination of the intended appeal be urgently heard inter partes.

The review sought is mainly based on the grounds that new and important information evidence have been discovered, which evidence, was not available and was not within the applicant's knowledge and the applicant could not therefore, have produced it before the court that made the order.

I have carefully perused and considered the arguments from both sides. The applicant deponed and argued that the court should have noticed that the time for proclamation of goods and equipment in execution of the decree against the applicant, was about to expire when the application dated 26<sup>th</sup> September, 2012 and seeking stay and leave to appeal out of time, was placed before this court. The applicant therefore added that the court should have granted the interim stay of execution, ex parte to prevent the proclamation from maturing on 2<sup>nd</sup> October, 2012.

In this application for review dated 3<sup>rd</sup> October, 2012, which is the matter before the court presently, the applicant highlights the following facts: -

***a) That the proclamation for sale of the applicant's property was issued by the court on 25<sup>th</sup> September, 2012 and was to expire or mature on 2<sup>nd</sup> October, 2012.***

***b) That the application seeking stay and leave to appeal out of time dated 26<sup>th</sup> September, 2012 was pending when the court refused to grant stay orders ex parte on 26<sup>th</sup> September, 2012.***

***c) That the said application might be rendered nugatory in the absence of stay orders which the court however, declined to grant.***

***d) That the applicant was a road construction company which would be exposed to numerous litigations if the pending process of execution would not be prevented.***

***e) That applicant was ready to deposit in court the whole decretal amount in question provided the court would review its orders and grant stay.***

It is clear to the court that none of the above grounds are newly discovered matters or evidence which were not available to the applicant when the applicant filed the application dated 26<sup>th</sup> September, 2012 seeking interim orders of stay. This court on the other hand, declined to grant the interim stay orders after examining the application and noting at the same time that the proclamation orders were maturing soon thereafter. The court had further noted that the applicant had come to seek the interim stay and leave to appeal out of time a little belated. That is why the court, in its discretion in these matters and fully conscious of the prevailing circumstances, sought to give the respondent therein, opportunity to be served, so that the orders sought would be granted, if at all, on merit.

On the other hand, and for the same above reasons, no sufficient or good grounds are demonstrated in favour of the applicant to persuade the court to grant the applicant the review orders sought. The grounds or points of argument or facts fronted by the applicant above, were available to it all the time and are not new nor newly discovered.

For that reason, the applicant has failed to demonstrate the conditions upon which this court can grant a review envisioned under Order 45 of the Civil Procedure Rules.

In addition and independently, this application for review was supposed to have annexed to it, the certified order intended to be reviewed. In my view, this failure is not a mere technical failure, but goes to the substance or root of the competency of the application.

The result is that the application is for either reason, found wanting and is hereby struck out and dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 14th day of May 2013.

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**D A ONYANCHA**  
**JUDGE**