REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L CASE NO. 285 OF 2013

JOHN MICHAEL WANJAO.....PLAINTIFF/RESPONDENT

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....DEFENDANT/APPLICANT

RULING

[NOTICE OF MOTION DATED THE 23RD OCTOBER 2020]

1. The defendant/applicant filed the Notice of Motion dated 23rd October, 2020 seeking for the following orders:

> *(b) ''This Honourable Court be and is hereby pleased to reinstate the stay of orders made on 19th February, 2020.*
>
> *(c) The Court be pleased to enlarge the time frame within which this application ought to be made.*
>
> *(d) This Honourable Court be pleased to review/vary and/or vacate the conditions attached to the stay of execution of the decree issued on 28th February, 2019 orders made on 19th February, 2020 to wit: the condition that the applicant deposits the sum of Kenya Shillings Three Million* ***(Kshs.3,000,000.00)*** *in a joint interest earning account is vacated;*
>
> *(e) In the alternative to prayer* ***(c)*** *above, this Honourable Court be pleased to vacate order* ***(a)*** *of the ruling dated 19th February, 2020 in entirety; and consequently, direct that, there be a stay of execution of the Judgement dated 21st February, 2019 and the resultant decree issued on 28th February, 2019, pending the hearing and determination of the Applicant's Appeal.''*

2. The application is opposed by the plaintiff/respondent through the replying affidavit sworn by **JOHN MICHAEL WANJAO** on the 18th December, 2020.

3. That when this matter came up for mention on the 8th December, 2020 directions were given that the parties file their respective submissions within 21 days. The learned counsel for the Defendant/Applicant filed their written submissions dated 18th February, 2021 erroneously entitled ***"Plaintiff/ Applicant Submissions…"***, while Counsel for the Plaintiff/ Respondent filed theirs dated the 22nd March, 2021.

4. I have considered the grounds on the application, affidavit evidence, the written submissions filed on behalf of the parties herein, superior courts decisions cited therein and come to the following determinations;

> a) That the primary issue for determination is whether the defendant has made a reasonable case for the review of the order made on the 19th February, 2020. That in the ruling delivered on 19th February, 2020, stay of execution orders were granted on condition that the Defendant/Applicant deposits Kshs.3,000,000.00 as security for the due performance of the decree within Sixty **(60)** days, failing which stay orders to lapse. That the Defendant/Applicant argues that this Court's decision requiring them, a county government, to deposit a security for performance as a condition for the grant of an order of stay contravenes **Order 42 Rule 8 of the Civil Procedure Rules,** which provides that no security as is mentioned in **Rule 6** and **7** shall be required of the government. The aforementioned position was upheld in the case of **MOMBASA COUNTY GOVERNMENT V. PAULINE WANJIRU KAGENI (2017), eKLR**. That in the case of **EUSOPHIA NYAGA KANYIFA & 2 OTHERS V COUNTY GOVERNMENT OF MOMBASA & 4 OTHERS [2021] eKLR,** the court made the following observation as relates to whether the government can be ordered to pay security for due performance:

''With regard to security for costs, in Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others, the Court stated:

> ***'...In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be balanced. In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for due performance of the decree as the parties wait for outcome of the appeal...'***
>
> ***From the above decisions, it is clear that the issue of security is discretionary and it is upon the Court to determine the same, depending on the circumstances of the case. It is my view that a conditional stay should be granted, and that the entire decretal sum shall be deposited in Court to secure the stay.''***

b) And in the case of **NATIONAL TRANSPORT AND SAFETY AUTHORITY V ELISHA Z. ONGOYA & 2 OTHERS [2019] eKLR** the Court made the following observation:

> ***''The applicant cannot ride on the Order 42 Rule 8 that being a government institution it cannot provide security. Section 3 of the National Transport and Safety Authority gives it a mandate as an entity which can sue and be sued. The consequence of being sued is that it can be ordered to pay damages. It cannot therefore run away from its liabilities and hide under the veil of Order 42 Rule 8 of the Civil Procedure Rules.''***

c) That the jurisdiction and the scope of orders of review is provided in **Section 80 of the Civil Procedure Act Chapter 21 of Laws of Kenya,** and **Order 45 of the Civil Procedure Rules**. That **Order 45 Rule 1(b) of the Civil Procedure Rules** provides the circumstances and conditions to be met for the grant of orders of review as paraphrased hereinbelow:

- ***discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant 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;***
- ***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.***

d) That the defendant has averred through the grounds on the application and submissions, and deponed in the supporting affidavit, that it was dissatisfied with the condition attached to the stay order and proceeded to term that requirement as an error and or mistake apparent on the face of the record **(ruling)**, that this court has the power or jurisdiction to correct through review. That an error apparent on the face of the record, was discussed at length in the case of **REPUBLIC V ADVOCATES DISCIPLINARY TRIBUNAL EX PARTE APOLLO MBOYA [2019] eKLR** as follows:

> ***''In Attorney General & O'rs v Boniface Byanyima HCMA No. 1789 of 2000, the court citing Levi Outa v Uganda Transport Company {1995} HCB 340, held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment." (emphasis mine)***

The Court went on to make the following observation…

> ***"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out, see the decision in Thungabhadra Industries Ltd. v. Govt. of A.P.1.***
>
> ***The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."***

That this Court dealt with a similar review application recently in the case of ***Danson K. Cheboi & 5 Others Vs Chesang Kiptalai & 10 Others – Eldoret ELC No. 530 of 2012***, where it declined to grant the prayer for review.

e) That although the Defendant/Applicant argues that the requirement of the payment of a deposit for due performance from a County Government amounts to an error of law, that can be termed as an error apparent on the face of the record, and that the said error ought to be corrected by an order of review, the Court of Appeal in **CHRISTOPHER MUSYOKA MUSAU V N. P. G. WARREN & 8 OTHERS [2017] eKLR,** cited with approval the decision in **Pancras T. Swai V Kenya Breweries Limited, Civil Appeal No. 275 of 2010** as it relates to an error of law:

> ***"If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction".***

The Court went on to make the following observation…

> ***''The power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the courts below. The power of review cannot be stretched, as the learned Judge did to reverse and overturn his own judgment under the garb of review.''***

f) That it is clear that the Defendant/Applicant is essentially aggrieved by the exercise of the court's discretion in issuing a conditional order of stay. I find that this matter does not fall within the per view of a review, as there is no apparent error on the face of the record. The Defendant/ Applicant should consider taking the appeal route against the decision made on the 19th February, 2020. That what the defendant/applicant perceives as a misapprehension of a law or a wrong exposition of the law cannot be a ground for review. This court has already pronounced itself on the issue of the orders of stay of execution in the ruling delivered on 19th February, 2020. This Court is therefore *functus officio* and it cannot make any other move on the matter in the manner proposed by the defendant/applicant.

5. That from the foregoing, I find that the Defendant/Applicant's application lacks merit and the same is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JUNE, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFF/RESPONDENT: ABSENT

DEFENDANT/APPLICANT: ABSENT

COUNSEL: ABSENT

COURT ASSISTANT: CHRISTINE