REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

COMMERCIAL & ADMIRALITY DIVISION

HCCC NO.9 OF 2015

RAINDROPS LIMITED ..... APPLICANT

VRS

COUNTY GOVERNMENT OF KILIFI ..... RESPONDENT

RULING

The defendant filed the Notice of Motion dated 22/7/2015 seeking two main prayers. A review of the findings or orders issued by the court on 9th July 2015 and secondly, an interpretation of those orders. The second prayer seeks interpretation of the orders in relation to payment of Value Added Tax (VAT), Income Tax, whether there is overpayment and whether the escrow account is illegal. This application is supported by the affidavit of Benjamin Kai Chilumo, a Chief Officer in the defendant's treasury sworn on 22nd day of July 2015.

On its part, the plaintiff filed its Notice of Motion dated 29/7/2015 seeking an order compelling the bank where the income is being held to comply with the court orders of 9th July, 2015 so that the plaintiff's 30% share can be released. The application is supported by the affidavit of Joseph Munyoki sworn on 29/7/2015 and a supplementary affidavit of the same person sworn on 30th July 2015. The defendant filed grounds of opposition to the plaintiff's application on 27/8/2015 and a replying affidavit sworn by Benjamin Kai Chilumo on 8th September, 2015. Similarly, the plaintiffs filed grounds of opposition and replying affidavit in opposition to the defendant's application.

Mr. Taib, counsel for the plaintiff relied on his written submissions filed on 20/8/2015. Mr. Taib submitted that the defendant has never obeyed the court orders. Even the first payment to the plaintiff was done through a court order. The defendant has stopped paying salaries to the employees, VAT and other taxes. The plaintiff is meeting all those expenses and this is a strategy by the defendant so that the plaintiff can collapse due to lack of funds. It is submitted for the plaintiff that a total of ksh.225 million has been collected so far. The plaintiff has served the defendant with its statement of account. A total of ksh.106,865,590/- is still being held in the escrow account. The plaintiff is seeking payment of ksh.57,379,866/45. The defendant has not provided its statement of accounts. Negotiations have collapsed and if the plaintiff's share of the funds is not released, the plaintiff company will collapse. Counsel maintains that the plaintiff has so far been paid ksh.47 million instead of ksh.87 million as alleged by the defendants. The payment to the plaintiff is not a commission but its share. There was an

amended agreement which did not terminate the original agreement. According to Mr. Taib, it is the defendant's obligation to pay salaries and VAT. No deductions should be made on the plaintiff"s share in form of withholding tax.

Mr. Bwire, learned counsel for the defendant submitted that the plaintiff's application amounts to garnishee proceedings which cannot apply against a County Government. Counsel relies on the Case of **Kilimanjaro Safari Club v The Governor of Kajiado: Nairobi Miscellenous Application number 442/2011** where the court held that a County Government is a Government within the meaning of the Government Proceedings Act and therefore garnishee proceedings cannot be issued against a County Government.

It is also contended by Mr. Bwire that the firm of Kilonzo Aziz Advocates is only assisting the firm of Mr. Taib. The application dated 29/7/2015 was filed by the firm of Kilonzo Aziz Advocates contrary to the provisions of Order 9 of the Civil Procedure Act. This makes the application to be incompetent. It is the defendant's position that it filed its statement of accounts. As by May 2015, the deposit in the bank account was ksh.215,387,557/88. The plaintiff is entitled to 30% of the gross income. However, withholding tax has to be deducted. So far the defendant has paid a total of ksh.86,596,209 which amount includes a sum of ksh.37 million ordered by the court. There is an overpayment of ksh.33 million. The plaintiff's share is supposed to be based on the gross income and not after deductions of salaries.

With regard to the defendant's application, Mr. Bwire contends that there is an error of law and fact apparent on the record which should be reviewed and that the defendant is seeking an interpretation of the court orders. It is Mr. Bwire's position that in dealing with the issue of collection of the income, the court relied on a letter dated 10/6/2013 as well as on the recitals on the amended agreement. The letter was written before the initial agreement of 24/2/2015 was amended and terminated. Secondly, the recitals are not binding on the parties. It simply expresses the intention of the parties. Where there is conflict between a recital and a provision in an agreement, the provision takes precedent.

It is further submitted that, there is an error of law on the court ruling as the court did not apply the doctrine of **Novation**. Had this doctrine been applied, then the court could have found that the original agreement of 24/2/2014 had been terminated by the 2nd amended agreement. This could have allowed the respondent to collect the income in line with clause 10 of the amended agreement. Counsel urged the court to consider section 5 of the VAT Act, 2013 and advice the defendant on whether VAT should be deducted. The defendant would also wish to know whether the defendant should incur any costs on behalf of the applicant. Sections 157 and 158 of the Public Finance Management Act prohibits deposit of Government money in private accounts. The court should advice whether the escrow account is valid.

The application by the plaintiffs mainly seeks to give effect to the court orders. The main application is by the defendant which seeks to review the same orders as well as have the court interpret the orders. The application by the defendant is brought under Orders 45 and 51 of the Civil Procedure Act as well as sections 1A, 1B and 3A of the same Act.

Order 45 Rule 1 states as follows:

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

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

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.

2. A party who is not appealing from a decree or order may apply for a review of judgment not withstanding the dependency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

From the provisions of Order 45 rule (1); an application for review has to satisfy the following requirements:

i. The discovery of new and important matter or evidence.

ii. The discovered new and important matter must not have been in the knowledge of the applicant even after exercising due diligence before the decree was passed.

iii. It must be shown that there is a mistake or error apparent on the face of the record.

iv. Any other sufficient reasons.

v. The application should be made within reasonable time.

The application has two limbs, namely a prayer for review of the court orders of 9th July 2015 and interpretation of those orders. The orders of 9th July are contained in a ruling of this court which resulted from an application by the plaintiff for orders of injunction as well as a prayer to refer the dispute to arbitration. As a result of the ruling, an order was extracted containing ten (10) specific orders. I need not reproduce the order as it is within the knowledge of both parties.

Mr. Bwire contends that the court allowed the plaintiff to continue collecting the rent based on the initial agreement that was replaced by the agreement of 4/7/2014. The recitals of the amended agreement are not binding and the letter of 10th June 2015 by the plaintiff 's Chief Executive Officer was written before the agreement was amended. Given the above submissions, the main issue would be whether the applicant's contentions fall within the requirements of Order 45. It is stated that there is an error apparent on the face of the record.

Whereas the defendant is of the view that the agreement of 20th February 2014 was replaced by the amended one of 4/7/2014, the plaintiff is of the contrary view. According to the plaintiff, both contracts are still existing and operational. Indeed there is no single clause in the amended agreement indicating that the first agreement was replaced by the amended agreement. The amended agreement provides under its definition section that ***"agreement"*** means the Agreement for the collection of cess and parking fees revenue in Kilifi County signed on the 20th February 2014. It also defines the amended agreement as the present amended agreement for the collection of cess and parking fees revenue in Kilifi County. If the court relied on communication between the parties as well as on the recitals of the amended agreement, this cannot be new evidence or important matter or error apparent on the face of the record. The issue as to whether the initial agreement was replaced can only be dealt with during a full hearing. It is not clear why the parties did not specifically indicate that the first agreement had been replaced. The defendant is trying to impute that the court ought to have held that the first agreement is no longer operational. If the court failed to do so, the best avenue would be an appeal and not a review. I clearly heard the submissions by Mr. Kiti Advocate that the first agreement is extinct while Mr. Taib submitted that is is still alive. This issue could not be concluded by the court with finality at the interlocutory stage.

Mr Bwire contends that recitals are not binding and if recitals are in conflict with specific provisions, then the provisions, takes precedence.

That is correct. The ruling of the court was not based on the recitals and the letter of 10/6/2014. It is a general observation of the relationship between the parties herein. Counsel relied on the American Case of **Construction Mortgage Investors Co. v Darrel A. Farr Dev't Corp. et al. Minnesota state Court of Appeal Case No.A09 of 1960.** The authority made reference to conditions precedent vis – a vis a

recital. It is clear that recitals do not create binding obligations but show the intention of the parties. The record did show that even after the agreement was amended, the plaintiffs continued to collect the income. The record shows that on 6th January 2015, the defendant wrote to the plaintiff calling for the surrender of receipt books for the period of 1st April to 9th January 2015. Further, on 26th November, 2014, Mr. Benjamin Kai Chilumo wrote to the plaintiff calling for the surrender of receipt books that had been given to the plaintiffs for purposes of facilitating the smooth collection of cess and parking fees. This was after the agreement had been amended. On 18th February 2015, Mr. Owen Baya, the defendant's secretary wrote to the plaintiffs on the issue of smooth handing over of operations so as to avoid any loss of revenue. All this shows that the plaintiff was collecting the income. In short, there is no error apparent on the record in relation to the collection of the income. I will revert to this issue of income collection in my ruling.

Mr. Bwire further contends that there is an error of law as the court did not apply the doctrine of **novation.** Since this court failed to apply the doctrine of **novation**, this can be a good ground of appeal. The defendant can argue that this court erred in law by failing to apply that doctrine. The defendant itself never urged the court to apply the doctrine of **novation**. This cannot be a discovery of a new matter. The substitution of an old agreement with a new one as entailed in the concept of **novation** cannot be applied mechanically. It is not a simple fact that once a new agreement is entered into, the old one becomes extinct. Evidence should be led to establish that all the rights and obligations stipulated in the old agreement have been duly transferred to the new agreement.

The next issue raised by the defendant relates to the payment of VAT and other taxes. Par. 6.1 of the Amended Agreement provides for Tax Law. It stipulates that the plaintiff shall be liable to pay taxes including income tax in accordance with the Kenyan Tax Laws. The agreement defines VAT. The only reference to VAT is section 1.2 (e) which states that ***"costs, charges, expenses or remuneration shall be deemed to include, in addition, references to any VAT or similar tax charged or chargeable in respect thereof."*** Counsel made reference to section 5 of the Value Added Tax. The section introduces the VAT tax to be chargeable on goods and services.

Mr. Bwire made reference to sections 157 and 158 of the Public Finance Act, Section 157 specifically allows the County Executive Committee Member in charge of finance to designate persons responsible for revenue collection. Section 2 defines a receiver of revenue in relation to a County Government to mean a person designated to be a receiver of revenue. There is no specific provision that the receiver has to be a County Official or that the County Executive Officer in charge of finance cannot designate a private entity to collect revenue on its behalf. Ordinarily the person in charge of County Finances will issue letters to those people allowed to collect County revenue. Assuming Mombasa County introduces some form of tax at the Kilindini Port, it can allow the Kenya Ports Authority to collect that tax and thereafter remit it to the County Government. The County Government can similarly contract a private company to collect the revenue.

The Public Finance Act should be read together with the County Governments Act No.17 of 2014. Section 6 of the County Government Act states the powers of County Governments. Under section 6 (1) (a), County Governments have powers to enter into a contract. Sections 6 (3) and 6 (4) and 6 (5) states as follows:-

> ***" 6 (3) A County Government may enter into partnerships with any public or private organization in accordance with the provisions of any law relating to public or private partnerships for any work, service or function for which it is responsible within its area of jurisdiction.***
>
> ***6 (4) All contracts lawfully entered into under this section shall be valid and binding on the County Government, its successors and assigns.***
>
> ***6 (5) To ensure efficiency in the delivery if service or carrying out of a function for which***

the County Government is responsible, the County Government may-

(a) establish a company, firm or other body for the delivery of a particular service or carrying on of a particular function; or

(b) <u>contract any person, company, firm or other body for the delivery of a particular service or carrying on a particular function."</u>

Under the County Governments Act, Counties can enter into agreements with private entities in exercising their mandate. The current agreement falls within the provisions of section 6 of the Act. Since the two parties agreed to share revenue and to deposit the collected revenue in the escrow accounts, it cannot be held that the escrow account is unlawful. The County Government is a signatory to that account. The escrow accounts were opened in the name of the County Government of Kilifi. These are not privately owned accounts.

On the issue of interpretation of the court order, it is clear to me that the defendant is introducing new issues relating to payment of VAT and Income Tax. The agreement does not provide for the manner in which such payments should be deducted. I have seen the plaintiff's invoices sent to the defendant. There is the expense on staff salaries which forms a big portion of the gross income. The VAT seems to have been based on 16% of the plaintiff's share. Two good examples are the months of June and July 2015 which provide the following picture:

JUNE 2015

Total Collections	Ksh.13,959,605.00
30% Share	Ksh.4,187,881.66
Staff Salaries	Ksh.2,950,640.00
16% VAT	(Ksh.670,061.06)
TOTAL VAT AND SALARIES	Ksh.3,620,701.00

JULY 2015

Total Collections	Ksh.12,959,398.00
30% Share	Ksh.3,887,819.00
Salaries	Ksh.2,968,640.00
16% VAT	Ksh.622,051.00
TOTAL VAT AND SALARIES	Ksh.3,590,691.00

If the above VAT and Salaries are to be deducted from the 30% share of the plaintiff, then the plaintiff's share for June and July 2015 would be ksh.567,180/60 and ksh.297,128/00 respectively. The plaintiff is expected to put up infrastructure for revenue collection. The above income may not be ideal for such an exercise. The plaintiff also has its own staff involved in the supervision of the project who need to be paid salaries.

The amended agreement makes specific provisions on payment of salaries. Paragraphs 21.7 and 21.8 provides as follows:

" 21.7 The county government shall be responsible for the payment of the salaries and allowances (if any) of the employees provided by

the County government to the Project Investor for collection of revenues and the County government shall at all times remain responsible for payment of the salaries of its revenue collection staff who will from time to time fall under the supervision of the Project Investor.

21.8 This agreement and in particular clauses 21.6 and 21.7 shall not under any circumstances be construed to mean that the Project Investor assumes any responsibility for the employees, officers and or personnel of the County Government (including those

who have been seconded by the County Government to the Project Investor).”

I have deliberately made the above analysis so that parties can see the profit margins as well as the operating expenses. The defendant should be able to see that a big portion of the income goes to settlement of salaries. The plaintiff submitted that the defendant is not paying the salaries. Although the defendant might view the plaintiff's share to be quite high, the obvious fact is that part of the payment covers salaries of its own

employees. The issue of payment of the plaintiff's taxes by the defendant does not arise. This can also explain the difference in the alleged amounts paid to the plaintiff. The salaries are about 40-50% of the plaintiff 's share. 40% of the alleged payment of ksh.86 million to the plaintiff gives a total of ksh.34,400,000/-. This is the alleged over payment. In essence therefore, if indeed ksh.86 million was paid to the plaintiff, about ksh.34 million went to salaries leaving a balance of ksh.52 million. VAT of 16% is included in this amount. This is about ksh.8 million leaving a balance of ksh.44 million. There is therefore no overpayment of ksh.33 million. The amount of ksh.37 million ordered by the court included VAT and salaries.

Counsel for the defendant cited some authorities although none was highlighted. The Case of **Schwartz v Hadid 2013 [NSWCAO 89 (NEW South Wales Court of Appeal)** and that of **Construction Mortgage Investors Co. v Darrel Afarr Dev't Corp et al (Court of Appeal of Minnesota Case No.A09 of 1960)** deals with the issue of recitals in agreements. The Case of Kilimanjalo Safari Club dealt with the issue of attachment against Government properties. It is clear that no attachment can be levied against the Government under section 21 (4) of the Government Proceedings Act. Similarly, Order 29 of the Civil Procedure Rules prohibits execution of decrees against the Government. Although the defendant is a government in its own right, the current dispute can be distinguished from what is envisaged by section 21 (4) of Cap 40 and Order 29 of Cap 21.

The current dispute is a business venture. The parties are entitled to share the income from the project. There is no court decree or judgment that is being executed. These are no garnishee proceedings as alleged. All what is sought is the release of the plaintiff's share out of the income as per the agreement. The defendant cannot refuse to execute the necessary documents for purposes of releasing the plaintiff's share on the pretext that no execution can be levied against a County Government. There is no execution being carried out. The court is simply being asked to order the release of the plaintiff 's share. The defendant's share will automatically be retained in the accounts. These are not garnishee proceedings.

With regard to the contention that the plaintiff 's application was filed by the firm of Kilonzo Aziz & Co. Advocates who are not on record, I do find that, that line of submission is not in line with the provisions of Order 9 of the Civil Procedure Act. The order provides for recognised agents or advocates. The plaintiff indicated that it was being represented by Mr. Taib and Mr. Kilonzo. Ordinarily, one firm would be the lead counsels or the one filing documents for the plaintiff. However, the filing of documents or applications drawn in the name of the second or assisting firm of advocates does not make such documents incompetent. There is no prejudice to the defendant. The firm of Kilonzo Aziz & Co. Advocates is being recognised as the plaintiff's advocates as well.

A party who seeks to review a court order must categorically state the reasons for seeking such orders. In such a situation, the court is called upon to correct its own mistakes. If it is an issue of correcting errors, the errors must be apparent on the face of the record. Section 80 of the Civil Procedure Act allows the making of an application for review. Order 45 gives the circumstances under which such applications can be made. Not every discovery of a new fact or matter will call upon the court to review its orders. Not every error on the record can be rectified by review orders. At times the rights of the litigants are affected in the event that earlier orders are reviewed. In **Kaiza v Kaiza [2009] KLR 499,** it was held that not every new fact would qualify for interference with the judgment or decree which sought to be reviewed. See also **Nderitu & 2 Others t/a Trustees of African Law Club v Harun (No.3): [1992] KLR 417.**

The contention that the doctrine of **novation** was not considered cannot be a ground for review. The effect of such contention is that the court's ruling was made in error. This is not the error apparent on the

face of the record as envisaged by section 80 and Order 45 of the Civil Procedure Act. In the Case of **Origo & Another v Mungala (CA) [2005] 2 KLR 307 at page 316,** the court observed as follows:

> ***"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction."***

Similarly, in the Case of **Mwihoko Housing Co. Ltd v Equity Building Society [2007] 2KLR,** the court held that an alleged error calling for review of a court decision must be self evident; The court noted as follows:

> ***"It is trite law, and we reiterate, that 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 not require an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of 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. See Nairobi City Council v Thabiti Enterprises Ltd [1995 – 98] 2 EA 251 (CAK).***
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> ***In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review."***

It is clear to me that there is no discovery of new evidence or important matters. If the court made errors of law and fact as alleged by the applicant, that cannot be a ground for review. Indeed, there are no errors of law or fact as alleged. The interpretation of the orders is that the agreement is still operating and the defendant should respect it by honouring its obligations. The defendant can do this by making monthly payments to the plaintiff so that the plaintiff's share is not always settled in arrears. That is what is required by section 6 (4) of the County Government's Act.

Turning to the plaintiff's application dated 29/7/2015 the main prayer is that the court directed the sharing of the income as per the agreement. However, since that time, the income accumulated upto now has not been shared. The court had directed the sharing of the income upto 31st May, 2015. The plaintiff's statement to the defendant shows that ksh.57,379,866/- is due to the plaintiff. This amount includes VAT, Staff and Salaries. I have noted a claim of ksh.20,000,000/- under the particulars of Steve Kithi & Co. Advocates for 27/8/2014. The amount falls under the column of 30% share. It is not clear to me whether the plaintiff was supposed to settle the advocate's costs. Steve Kithi & Co. Advocates are not appearing in this suit but the two agreements show that the said advocate prepared them. Paragraph 6.6 of the amended agreement does provide for the legal costs incurred in the preparation of the agreement. The provision is a replica of the same paragraph of the initial agreement of 20/2/2014.

The ruling of 9th July 2015 referred the parties to pursue the dispute resolution mechanism under the contract. It seems nothing positive has happened. The plaintiff is still collecting the income and pays the staff. This exercise cannot effectively continue without the plaintiff receiving its fair share of the income. The defendant seems to be at pains in settling the plaintiff's share. It should not be the case that the plaintiff cannot obtain its fair share unless the court orders payment. The defendant should know that the agreement is still operational and therefore the clauses on sharing of income still binds the defendant.

The statement shows that from the time the court ordered payment up to date, no other payment has been made. Over 40% of the payments made to the plaintiff covers staff salaries. It is the responsibility of the

defendant to pay the staff. The taxes cannot be collected if the staff are not paid their salaries.

The overriding objective of the contract was the collection of the cess and parking fees by the plaintiff on behalf of the defendant. The plaintiff was expected to improve the income up to over ksh.700 million. It seems parties have forgotten that target and are now involved in petty disputes which do not benefit anyone. The environment is no longer conclusive to attain that target. Since the plaintiff cannot be expected to collect the taxes without incurring expenses, I do find that the application dated 29/7/2015 is merited and is hereby granted as prayed. The amount payable as per the plaintiff's statement of July 2015 shall be less the sum of ksh.20 million under the heading of M/s Steve Kithi Advocates. The rest of the amount totaling ksh.37,379,866/46 to be released to the plaintiff. This amount include the salaries of the defendant's staff paid by the plaintiff.

The defendant has vehemently contested the idea that the plaintiff collects the income. It is true that each party's share is determined by the gross collection. The defendant has insisted that the plaintiff was meant to

only supervise the collection. Paragraphs 10.5 and 10.13 of the amended agreement states that the plaintiff shall supervise collection. It does not

matter who undertakes the collection. Paragraph 10:23 indicate that the overall direction and supervision of the project shall be vested in the Project Investor, i.e the plaintiff. The term **project** is clearly defined under the agreement. The plaintiff is responsible to pay salaries and can as well collect the income but ensure that the salaries are fully paid on time and the income levels do not fall below the current monthly collections. Further, the defendant should ensure that the plaintiff's 30% share is dutifully paid as per the agreement.

In the end, I do find that the defendant's application for review and interpretation lacks merit. I will however, consider the persistent request that the defendant collect the income. This court will allow the defendant to collect the income as currently it is still its staff who collect the income. The defendant to pay the staff involved in the collection of the income directly. The defendant shall pay the plaintiff's 30% share plus VAT every month. The plaintiff's application dated 29/7/2015 is hereby granted as prayed. The bank in which the revenue or the collected income is banked is hereby ordered to forthwith release a total of ksh.37,379,866/46 to the plaintiff. Should the defendant fail to release any future dues to the plaintiff, the plaintiff shall be at liberty to apply. Since there is no progress in the out of court settlement, I will review orders number two(2) and three (3) of my orders of 9th July 2015 and remove the time limit indicated therein. The parties to explore out of court settlement as per the court ruling but without time constraint.

Lastly, my advice to the parties is that they should not look upon the court to solve the problem. The court can hear and determine the dispute but there is still room for self involving dispute resolution. The defendant lawfully advertised a tender and the plaintiff was the best evaluated bidder. What remains is for the parties to sit down and agree on how to carry out the work. A plethora of applications and counter applications to the court is not the way to go. Each party shall meet their own costs.

Dated, signed and delivered at Malindi this 9th day of July, 2015.

SAID J. CHITEMBWE

JUDGE