



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Miscellaneous Civil Application 539 of 2009**

**CORNER GARAGE & SPRAYING WORKS LTD.....APPLICANT  
VERSUS  
MILKAH WANJA WAIREGI.....RESPONDENT**

**RULING**

This application by Notice of Motion dated 10<sup>th</sup> November, 2009 and lodged by **Corner Garage & Spraying Works Limited** (hereinafter “*the applicant*”) seeks two main orders in the alternative namely:-

- (a) **That the court be pleased to issue an order compelling the Respondent to deliver motor vehicle registration number KAZ 557Z (hereinafter *the suit vehicle*), to the applicant’s yard situated at Ganjoni in Mombasa or in a neutral place for safe keeping pending the hearing and determination of the appeal.**
- (b) **That in the alternative the court be pleased to order that the respondent deposits the sum of Kshs. 159,326/= in court pending the hearing and determination of the appeal.**

The application is premised on the grounds set out on the face of the application and also on the averments deposed to by the applicant in the supporting affidavit sworn by one **Ramesh Pandya**, the applicant’s director. The main grounds on the face of the application are as follows:-

- (1) **That the applicant repaired the suit vehicle which belongs to the respondent for Kshs. 159,326/= but the respondent has not paid the said repair charges.**
- (2) **That the applicant intends to exercise its right to appeal against the order granted on 16<sup>th</sup> October, 2009 in Mombasa SRMCCC No. 940 of 2009 (Milkah Wanja Wairegi – v – Corner Garage & Spraying Works Ltd) compelling the applicant to release the suit vehicle to the respondent which was effected on 22<sup>nd</sup> October 2009.**
- (3) **That since the applicant has not been paid for repairing the suit vehicle it would only be fair if the court orders that the suit vehicle be delivered to the applicant’s yard.**
- (4) **That in the alternative it would be prudent if the court orders the respondent to deposit the sum of Kshs. 159,326/= in court pending the hearing and determination of the appeal.**

In the supporting affidavit, it is deposed, *inter alia*, that the applicant stands to suffer substantial loss unless the orders sought are granted. Annexed to the said affidavit are copies of pleadings in the Lower Court and the order being challenged in the appeal.

The application is opposed and there is a replying affidavit sworn by the respondent. She has deposed in the affidavit, *inter alia*, that the said repair charges are owed by her Insurers **M/S Standard Assurance Company Limited** which is under statutory management and that in any event it has not been shown that she would be unable to pay if she is found liable in the Lower Court suit. In the premises, she contends that the applicant has not demonstrated that it will suffer substantial loss unless the order sought is granted.

When the application came up for hearing before me on 10<sup>th</sup> May, 2010, counsel agreed to file written submissions which they duly filed by 10<sup>th</sup> June, 2010. In the submissions on behalf of the applicant, it is contended that the appeal is arguable and to secure the

interest of the applicant the order sought should be granted. On his part, counsel for the respondent contends that this application is incompetent since there is no pending suit. It is also argued that the agreement to repair the suit vehicle was between the applicant and the said Insurance Company and the respondent is not in the premises indebted to the applicant and to compel her to deliver the suit vehicle to the applicant's yard shall cause her great hardship.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The applicant's appeal is from a decision made in an interlocutory application. The parent suit is pending hearing and determination in the Lower Court. The applicant's main interest is in its repair charges. It otherwise acknowledges that the suit vehicle belongs to the respondent. There is no averment by the applicant that the respondent is impecunious and will not be able to pay the repair charges in the event that the respondent's suit is dismissed. This being an interlocutory application pending an appeal from an interlocutory appeal, it is prudent not to conclusively make findings on facts or Law lest I put the trial court and the Judge who will hear the appeal in a bind. I can however, state with certainty that the material placed before me is not sufficient to persuade me to hold that the applicant stands to suffer substantial loss unless the order sought is granted. I am fortified in this view having seen an undertaking as to damages by the respondent in the Lower Court. The applicant has also not lodged any claim against the respondent to date.

In view of the foregoing I have come to the conclusion that the appellant's application dated 10<sup>th</sup> November, 2009 has no merit and I order it to be dismissed with costs.

Order accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 15<sup>TH</sup> DAY OF JULY 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Obura for the Applicant and Sudi holding brief for Muinde for the Respondent.

**F. AZANGALALA**

**JUDGE**

**15<sup>TH</sup> JULY 2010**