



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI(MILIMANI COMMERCIAL COURTS)**

Civil Case 554 of 2007

**M. N. NG'ANG'A..... 1ST PLAINTIFF
A. N. THANGEI.....2ND PLAINTIFF
J. M. THIGA3RD PLAINTIFF
ALL T/A WARUHIU KOWADE & NG'ANG'A ADV**

VERSUS

**LAB CONSTRUCTION LTD.....1ST DEFENDANT
LAB ENTERPRISES LTD.....2ND DEFENDANT
KISUMU CONCRETE PRODUCTS LTD.....3RD DEFENDANT
AND
WILLIAM MURIITHI KIMARU.....1ST INTERESTED PARTY**

ELIZABETH AKINYI.....2ND INTERESTED PARTY

RULING

1. By a ruling of **Kariuki J**, delivered on 24th December 2008, it was ordered that motor vehicle registration Numbers KAU 856 J Mercedes Benz, KAL 153 Q and KAC 287 Z should be delivered forthwith by the interested Party for storage at Leakey's storage yard in Industrial Area Nairobi. This order was confirmed by **Kimaru, J** in his ruling dated 25th November 2009. The Interested Party has now filed a Notice of Motion under Order 44 of the Civil Procedure Rules seeking for the review of the order by **Kariuki J** made on 24th December 2008 to the extent that the place of storage of the motor vehicles be changed from Leakey's storage Nairobi, to New Simba Security Guards Yard in Kisumu. They also sought for orders that **M/s Igare Auctioneers** be enjoined in this suit as interested parties.

2. This application is premised on the grounds that subsequent to the ruling, the parties to this suit entered into a mutual agreement and understanding that the motor vehicles be stored in a neutral place in Kisumu because they consist of broken down and un insured trucks which were attached in Kisumu. It was submitted by Mr. Namanda, learned counsel for the applicant that the basis of that mutual agreement between the parties' advocates was based on the fact that the vehicles were safely stored in Kisumu at New Simba Security Yard which was also cost effective. However, the Respondents Advocates reneged on that arrangement and threatened to institute committal proceedings.

3. That is what precipitated this application. It was further argued **on behalf of the Interested parties that on 24th December 2008 when Kihara J**, issued the orders that the vehicles be stored in Nairobi, the court was not informed that the attachment took place in Kisumu although the sale by public auction took place in the Auctioneer's offices in Eldoret. These motor vehicles were domiciled in Western part of the country. They were also run down and two of them were not mobile on their own and required to be towed or uplifted. If this information was before the court, the Judge would have made an order that they be stored in Kisumu. Counsel argued that there are sufficient grounds to enable this court grant an order of review. It also makes economic sense to have the vehicles stored in Kisumu pending the determination of the dispute.

4. Moreover the party ordered to transport the vehicles is the interested parties who purchased them at an auction without any notice

of defect in the title. **M/s Igare Auctioneers** who sold the vehicles should be made parties to this suit so that they can explain the circumstance under which the vehicles were sold. As regards the delay in bringing this application, it was argued that the parties had agreed to vary the court order by consent and have the motor vehicles stored in Kisumu in order to save costs of translocation, of the trucks which had not moved for two years.

5. This application was opposed; counsel for respondent relied on the grounds of objection filed on 3rd February 2010. Mr. Wasuna learned counsel for the Respondent challenged this application which he submitted is defective. The order sought to be reviewed was not annexed to the application. Secondly, the application was faulted for having been brought after undue delay. On the issue of costs involved in the translocation of the motor vehicles, it was submitted that it was within the knowledge of the Applicants even when the application was argued before **Kihara J.** Moreover, the same issues were conversed before **Kimaru J.** Who confirmed the order by **Kariuki J.** There are no new matters that were not within the knowledge of the Applicants when the matter was determined by **Kariuki J.** This court is otherwise being asked to sit and determine its own appeal.

6. Counsel for Objector also opposed this application. It was submitted that application was meant to circumvent the orders of this court. The Interested Parties participated during the hearing of the application; the sale to the interested parties was lifted by court. The sale was actually set aside however, the interested parties want to keep the motor vehicles in Kisumu by litigating on the same matters over and over.

7. This application seeks for the review of this court's order pursuant to the provisions of Order 44 of the Civil Procedure Rules which provides as follows:

- “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.”***

8. For an applicant to succeed in an application for review, they must also show or establish there is a mistake or error apparent on the face of the record. The error must be manifest and does not require any examination in order for the court to review its own order. This application was faulted for failure to attach the orders sought to be reviewed. It is now an established practice that a party seeking to review an order must extract a copy and annex it to the application. The applicant did not do this; the court had difficulties to decipher the hand written ruling by **Kihara J.** So as to establish the reasons for review several months down the line after the ruling was delivered.

9. One of the principle ground relied upon by the Applicant is that there will be enormous costs for translocation of the subject motor vehicles from Kisumu to Nairobi by the Interested Parties who were innocent purchasers for value. I am not satisfied that this is a new matter which was not within the knowledge of the Interested parties when the order was made. Moreover the Applicant has not attached any material to support that reasoning. There is no correspondence to show that parties had entered into a mutual agreement to store the motor vehicles in Kisumu and which varied the court order. Apart from the application being defective, for failure to annex the order sought to be reviewed, I also find that it lacks merit, it is hereby disallowed. The orders seeking to enjoin **M/s Igare Auctioneers** as Interested parties in this suit was not opposed. Accordingly they may be enjoined as parties to this suit. The pleadings be served upon **M/s Igare Auctioneers** through the registered officials within 15 days.

10. Costs of this application shall be in the cause.

DATED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2010.

M. KOOME
JUDGE