



**REPUBLIC OF KENYA**  
**MILIMANI COMMERCIAL COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT 554 OF 2007**

**M.N. NG'ANG'A**

**B.N. THANGEI**

**WARUHIU K'OWADE ADVOCATES.....PLAINTIFF**

**VERSUS**

**LAB CONSTRUCTION LIMITED.....1<sup>ST</sup> DEFENDANT**

**LAB ENTERPRISES LIMITED.....2<sup>ND</sup> DEFENDANT**

**KISUMU CONCRETE PRODUCTS LTD.....3<sup>RD</sup> DEFENDANT**

**LALJI KARSAN RABADIA.....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

This is a Notice of Motion application expressed to be brought under Order XXI Rule 55, Order L Rule 1 Civil procedure Rules, Section 3A Civil Procedure Act. The application is based on the following grounds. That the Decree Holder has failed to reply to the court or the Objector within the time prescribed in the notice whether or not he intends to proceed with the Attachment of the motor vehicle KAU 856J Mercedes Benz.

I note on the affidavit of service dated 12<sup>th</sup> November, 2008 sworn by Peter Njue Mugo that the Notice of Motion, the subject matter of this application together with the supporting affidavit were served upon Waruhiu K.O'Wade and Ng'ang'a Advocates. Despite service the decree holder in this case has not filed any replying affidavit. I also note from the supporting affidavit annexure 2 thereof, that the notice of objection to attachment dated 14<sup>th</sup> October, 2008 was served upon the decree holder's Advocate. Since receipt of service the 15 days given in the notice within which the decree holder was to intimate whether it intends to proceed with the attachment of the vehicle the subject matter of the instant application has since lapsed.

Mr. Ogembo argued this application on behalf of the Objector/Applicant. Counsel urged the court to not only lift the attachment over the suit vehicle, but also assess the loss of user and of profits suffered by the Objector due to the attachment of the vehicle and make an appropriate order for payment of the said loss.

I have considered the application. Under Order XXI rule 55, the court has power to order the raising of the attachment either as to the whole or portion of the property, the subject of the attachment in accordance with the intimation received from the attaching creditor, in this case the Decree Holder. Under the same rule the court also has the power to order payment of costs as it shall deem fit.

Having considered the circumstances surrounding the attachment and the objection raised by the Applicant herein, I am satisfied that the decree holder has no intention of pursuing the attachment over the motor vehicle which is the subject matter of this application. The attachment over the vehicle should therefore be raised forthwith as of right. In regard to the submission by counsel that the court should order for the payment of loss of user and loss of profits due to the attachment of the vehicle, Order XXI rule 55 on the Civil Procedure Rules does not deal with the issue of damages. Loss of user and loss of profits are special damages. If the Objector desires to claim this, the correct procedure in my view would be to file an appropriate suit and claim the said damages. The only order the court can make is as regarding the costs touching on the application before it. In the instant application the Objector who is the Applicant is only entitled to the costs of bringing this application.

In conclusion, I allow the Notice of Motion application dated 5<sup>th</sup> November, 2008 as follows:

- 1. The attachment of the motor vehicle registration No. KAU 856J Mercedes Benz by Igare Auctioneers on the 3<sup>rd</sup> October, 2008 be and is hereby lifted forthwith.**
- 2. The costs of this application shall be met by the Decree Holder.**
- 3. The Decree Holder will also pay the auctioneers reasonable charges to be taxed if they are unable to agree.**

**Dated at Nairobi this 14<sup>th</sup> day of November, 2008.**

LESIIT, J.

JUDGE

***Read, signed and delivered, in the presence of:***

Mr. Ogembo for the Objector/Applicant

N/A for the Respondent

LESIIT, J.

JUDGE