



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

**Civil Suit 541 of 2005**

**BARCLAYS BANK OF KENYA LIMITED.....**  
**.....PLAINTIFF**

**VERSUS**

**ABDI ABSHIR WARSAME .....1<sup>ST</sup>**  
**DEFENDANT**

**DAQARE TRANSPORTERS LIMITED.....2<sup>ND</sup>**  
**DEFENDANT**

**R U L I N G**

The plaintiff filed this suit against the defendants and sought in the prayers in the plaint for judgment of the sum USD 39, 000 or the equivalent of kshs 2, 860, 348. 80, and a mareva injunction seeking to restrain the defendants from drawing or dealing certain bank accounts.

On 12<sup>th</sup> October 2005 parties entered into a consent in the following terms:

1. That the 1<sup>st</sup> defendant do pay the plaintiff the sum of 39, 000 US dollars on or before 2<sup>nd</sup> November 2005.
2. That pending payment of the said amount the injunction orders shall remain in force on account Nos 7174242 and 7175184 with Barclays Bank of Kenya Ltd. Muthaiga Branch.
3. That the injunction on account NO. 002026530 Paramount Universal Bank be and is hereby lifted.
4. That in default of payment, execution to issue against the 1<sup>st</sup> defendant.
5. That parties are at liberty to apply.

The second defendant has moved this court with an application under Notice of Motion brought under sections 3A and 34 of the Civil Procedure Act.

The said application has prayers seeking to stop the sale or transfer or registration of the motor vehicle registration No. KAQ 076Z; that the certificate of costs, execution orders, warrants and proclamation or any process issued against the 2<sup>nd</sup> defendant be set aside; and that **KING'ERI WANJOHI t/a Kindest Auctioneers** be joined in this application.

The 2<sup>nd</sup> defendant counsel submitted that the consent of 12<sup>th</sup> October 2005 related to the 1<sup>st</sup> defendant only. That that consent did not cater for costs. That at execution the plaintiff executed against both 1<sup>st</sup> and 2<sup>nd</sup> defendant. That when Kindest Auctioneers proclaimed on 15<sup>th</sup> November 2005, he proceeded to attach motor vehicle registration No. KAQ 076Z, which vehicle was registered in the name of the 2<sup>nd</sup> defendant. That the 2<sup>nd</sup> defendant initially filed objection proceedings objecting to the said attachment but that application was dismissed on a technicality. On or about 21<sup>st</sup> February 2006 the aforesaid auctioneer advertised for sale the said motor vehicle. Counsel drew the court's attention to the copy of records with the Registrar of motor vehicle, which copy showed that the said motor vehicle was registered in the name of the 2<sup>nd</sup> defendant and NIC bank. That a further search was carried out at the Registrar of Motor vehicles on 15<sup>th</sup> May 2006 which revealed that the said motor vehicle has not been transferred to a third party. 2<sup>nd</sup> defendant contends that he does not know if a sale did in fact take place because to date there is no evidence of such sale; that in any case the plaintiff had not shown a receipt of such sale as required by order 21 Rule 68 (2) of the Civil Procedure Rules. 2<sup>nd</sup> defendant stated the plaintiff having described the 2<sup>nd</sup> defendant as a Limited Liability Company, which description the 2<sup>nd</sup> defendant accepted, ought not to have executed the 1<sup>st</sup> defendant's judgement as against the 2<sup>nd</sup> defendant. 2<sup>nd</sup> defendant relied on the case of LAKELAND MOTORS LIMITED – AND – HARBHAJAN SINGH SEMBI CIVIL APPLICATION NO. NAI 24 OF 1998 [UR], where the court of appeal stated as follows:

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**“The flagrant disregard of the provisions of this rule” (Rule 12 (b) of the Auctioneers Rules 1997) “smacks of gross irregularity in the respondents execution process of the decree of the superior court in Civil Case NO. 227 of 1997. It would be an abuse of the process of this court if we were to countenance such an execution..... we think that on account of the respondent’s non-compliance with the law in the execution process of the decree as we have indicated in this ruling and to prevent abuse of the process of this court, in the exercise of our inherent power under rule 1 (3) of the aforesaid Rules the said execution process must and is hereby set aside.”**

2<sup>nd</sup> defendant in relying on that authority said that it had been denied the right to its said motor vehicle without a valid court order being in place.

The plaintiff relied on grounds of opposition, which brought out the following issues:

- That the application is in competent;
- That the 2<sup>nd</sup> defendant is not a Limited Liability Company;
- That the attempted distinction between the 1<sup>st</sup> and 2<sup>nd</sup> defendant is unattenable in law;
- Costs follow the event hence the issuance of certificate of costs is a final pronouncement on costs.

The plaintiffs counsel did expound on those grounds but on the ground where it is claimed that the 2<sup>nd</sup> defendant is not a Limited Liability Company and is not distinct from the 1<sup>st</sup> defendant was not expounded.

Having considered the arguments presented before me and the affidavit evidence, I can only conclude that the plaintiff's execution of the decree herein was riddled with irregularities and illegalities galore. The plaintiff even in submissions accepted that the consent judgement only related to the 1<sup>st</sup> defendant. The plaint in paragraph 3 states:

**“The 2<sup>nd</sup> defendant is a Limited Liability Company duly incorporated in the Republic of Kenya.”**

I could not find an amended plaint and hence the 2<sup>nd</sup> defendant's description remains as stated. The fact remains that there is no judgment against the 2<sup>nd</sup> defendant and therefore any execution levied against it

is illegal and cannot be maintained. The plaintiff chose to rely on grounds of opposition and although it attempted to rely on previous affidavits that attempt on being objected to, the objection was upheld as per the provisions of Order 50 Rule 16. The plaintiff was accordingly unable to prove sale of the attached motor vehicle and was unable to controvert the search carried out by the 2<sup>nd</sup> defendant on 15<sup>th</sup> May 2006, which revealed that the motor vehicle is still registered in the 2<sup>nd</sup> defendant's name.

On the issue of costs awarded to the plaintiff that award is irregular. The consent did not provide for costs and it was therefore necessary for the plaintiff to apply to the court for the court to award it costs. The plaintiff could not on its own motion seek for costs to be certified whilst there was not such award issued to it. Those costs will be set aside accordingly.

The 2<sup>nd</sup> defendant's prayer to join Kindest Auctioneers in these proceedings will not succeed. The auctioneer, after all obtained warrants to execute against the two defendants and those warrants were issued after the plaintiff, albeit wrongly, applied for execution against both defendants. Accordingly that prayer will not be granted.

As a consequence of the court's findings herein above the court will grant the following orders: -

- (1) That the plaintiff is estopped from selling, transferring or registering to any person motor vehicle registration NO. KAQ 076Z.**
- (2) That the plaintiff do forthwith release motor vehicle registration No. KAQ 076Z to the 2<sup>nd</sup> defendant.**
- (3) That execution against the 2<sup>nd</sup> defendant be and is hereby stayed until further orders of this court.**
- (4) That the certificate of costs hereof is hereby set aside.**
- (5) That the costs of the Notice of motion dated 18<sup>th</sup> May 2006 are awarded to the 2<sup>nd</sup> defendant to be paid by the plaintiff.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 12<sup>th</sup> July 2006.

**MARY KASANGO**

**JUDGE**