



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

**Civil Case 541 of 2005**

**BARCLAYS BANK OF KENYA  
LTD.....PLAINTIFF/APPLICANT**

**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 has moved this court by notice of motion dated 25<sup>th</sup> July, 2006. The same is brought under section 80 of the Civil Procedure Act and Order XLIV rule 1(1) of the Civil Procedure Rules. The Plaintiff seeks a review to vacate and/or setting aside of this honourable court order made by a ruling dated 12<sup>th</sup> July, 2006. The Plaintiff seeks the review to vacate or setting aside of the following orders:-

***“1. That the Plaintiff is estopped from selling, transferring or registering to any person motor vehicle registration No. KAQ 076Z.***

***1. That the Plaintiff do forthwith release vehicle registration No. KAQ 076Z to the 2<sup>nd</sup> Defendant.***

***2. ....***

***3. That the certificate of costs hereof is hereby set aside....”***

The application is supported by the affidavit of Cecil Guyana Miller. He depones as follows:-

***“That this suit was filed for the recovery of USD 39,000 or the equivalent of Kshs.2,860,348.80 and for a Mareva injunction restraining the Defendants from drawing or dealing with their respective bank accounts at Paramount Universal Bank or any other bank.”***

At *inter partes* hearing of an interim application a consent was recorded whereby the 1<sup>st</sup> Defendant agreed to pay to the Plaintiff the sum of USD 39,000. This payment was to be made on or before the 2<sup>nd</sup> November, 2005. A copy of the consent was exhibited in the affidavit. Following the said consent the 1<sup>st</sup> Defendant failed to make payment as agreed and therefore the Plaintiff proceeded to execute for the amount consented to. As a consequence of that execution auctioneers attached a motor vehicle registration number KAQ 076Z. That motor vehicle was advertised for sale and indeed was sold for

Kshs.360,000/00. That prior to the said sale the 2<sup>nd</sup> Defendant had instituted various objections proceedings but failed to prosecute them to finality. The said motor vehicle following the sale was released to M/s Tropicana Linkline Limited who were the purchasers thereof. The deponent stated that it was the duty of the purchaser to effect the transfer of ownership at the registrar of motor vehicles. He deponed that when the application of the 2<sup>nd</sup> Defendant dated 15<sup>th</sup> May, 2006 came up for hearing the information about the sale of the motor vehicle was not in the possession of the Plaintiff. Consequently he stated that the orders granted by this court by its ruling of 12<sup>th</sup> July, 2006 would be in vain for indeed the motor vehicle is now in the possession of the purchaser at the auction. He stated further that the Plaintiff is dissatisfied with order made on 12<sup>th</sup> July, 2006 and it desired that these orders be reviewed or vacated.

In oral submissions Plaintiff's counsel stated that if the prayers sought were not granted the Plaintiff would suffer injustice since the 2<sup>nd</sup> Defendant had already extracted and served on the Plaintiff the order and also the penal notice. The Plaintiff's counsel also stated that the Defendants had come to court with 'dirty' hands because they had failed to honour the consent judgment. The Plaintiff relied on the case reported in the law monthly magazine being Digest Number 336 that is the case of **John Francis Muyodi vs Industrial and Commercial Development Corporation and Another**. The Plaintiff relied on the holding of the case as follows:-

· *In an application for review, it is incumbent upon the applicant to show that there has been discovery of new and important matters or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason.*

· *An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.*

The Plaintiff's counsel said that the court had power to grant leave to the Plaintiff to rely on its previous affidavits at the hearing of the 2<sup>nd</sup> Defendant's application dated 18<sup>th</sup> May, 2006. This he said can be seen to have been the finding of the case **Komassai Plantations Ltd v Bank of Baroda Kenya Ltd (2003) 2 EA**. In this case he stated that the court had granted leave to a party to rely on a previously filed affidavit. The Plaintiff also sought to rely on the case of **Nduati v Mukami (2002) 2 KLR** where the court had invoked its inherent power to entertain an application for the review of orders made previously. The Plaintiff's counsel finally submitted that it is in the interest of justice that the orders sought be granted for if the court did not grant the orders the ruling of 12<sup>th</sup> July, 2006 would be in vain for the plaintiff is unable to give possession of the motor vehicle to the 2<sup>nd</sup> Defendant as was ruled. The application was opposed by the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant's counsel Mr. Wachira Mari swore the affidavit in reply. He deponed that on being served with the application made by the 2<sup>nd</sup> Defendant the Plaintiff filed grounds of opposition but failed to file an affidavit. In those grounds of opposition the Plaintiff sought to introduce previously filed affidavits. That the said reliance was objected to by the 2<sup>nd</sup> Defendant's counsel and that objection was upheld. That by the present application the Plaintiff now intends to introduce material that is not new but which was within the knowledge of the Plaintiff at the hearing of the 2<sup>nd</sup> Defendant's application. He therefore concluded that the Plaintiff had not shown any sufficient reason or error apparent on the face of the record to justify the present application. He stated that it is clear that the present application was an afterthought and made in bad faith with a view to defeating or delaying the execution of the orders granted to the 2<sup>nd</sup> Defendant.

In his oral submissions 2<sup>nd</sup> Defendant's counsel stated that the affidavit sworn by Cecil Guyana Miller was defective for failing to state the place of abode of the deponent. This he said was in contravention to order XVIII rule 4 of the Civil Procedure Rules. To support this argument the defence counsel relied on the case of **Jovenna East Africa Ltd vs Sylvester Onyango & others (UR)**. In this case the court struck out a verifying affidavit which had many defects for example it had failed to state who the drawee was, it failed to verify the plaint and the deponent had failed to state that he had authority to swear the

same. 2<sup>nd</sup> Defendant also relied on the case of **In the Matter of Amarco (Kenya) Ltd W/U No. 5 of 2005 (UR)**. This case also the affidavit had many defects and was accordingly struck off. 2<sup>nd</sup> Defendant in reliance of that submissions and the aforesaid cases sought the striking out of the affidavit of Cecil Guyana Miller and on it to being struck out he sought that the whole application would also be struck out. 2<sup>nd</sup> Defendant further stated that the Plaintiff had failed thus far to prove that the possession of the motor vehicle had been given to the purchaser. In this regard he said that order XXI rule 68 (1) & (2) of the Civil Procedure Rules require that evidence of sale of moveable goods be by way of a receipt. 2<sup>nd</sup> Defendant said that the Plaintiff had failed to exhibit the receipt of the alleged sale by auction. He therefore submitted that the court has not been satisfied that a sale be take place. He said that the letters exhibited in the Plaintiffs application which letters were written by the auctioneer to the registrar of motor vehicles did not satisfy that requirement. He therefore stated that the Plaintiff had not shown a discovery of new matters or sufficient reason to justify the review sought. In this regard he relied on **Mulla The Code of Civil Procedure** and particularly relied on page 1055. He said that at a hearing of a review Mullar stated as follows:-

***“.....neither party will be allowed to adduce evidence which was available and which with reasonable diligence could have been produced at the trial.”***

Having heard the arguments of all counsels it is necessary perhaps to give a brief background of the Plaintiffs application. The 2<sup>nd</sup> Defendant moved this court by way of notice of motion dated 18<sup>th</sup> May, 2006 whereby the 2<sup>nd</sup> Defendant sought to stop registration of any transfer of a motor vehicle registration number KAQ 076Z. He also sought the setting aside of the certificate of costs issued by this court on 12<sup>th</sup> October, 2005. And finally the 2<sup>nd</sup> Defendant sought to release to itself of motor vehicle registration number KAQ 076Z. At the hearing of that application the Plaintiff had filed grounds of opposition which were filed before this court on 31<sup>st</sup> May, 2006. The main thrust of those grounds was that the Plaintiff sought to rely on affidavits it had filed previously in this matter. An objection was raised by the 2<sup>nd</sup> Defendant which objection was based on Order L rule 16 of the Civil Procedure Rules. The court upheld that objection and indeed stated that the said rule only allowed a party to rely either on a replying affidavit or grounds of opposition filed in response to an application. As a consequence of that ruling the Plaintiff was unable to rely on facts in opposition to the 2<sup>nd</sup> Defendant's application. The court delivered its ruling dated 12<sup>th</sup> July, 2006. The court in that ruling granted 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.**

The Plaintiff has moved this court by the present application under Order XLIV rule 1 of the Civil Procedure Rules. That rule provides 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.”**

In considering the Plaintiff’s application one thing that the court cannot avoid is to consider the evidence brought before it, that indeed the subject motor vehicle was sold at an auction. I find that the letter written by the auctioneer which was exhibited in the application was sufficient reason for this court to be moved to review its previous orders as per Order XLIV Rule 1 (1). Indeed as the Plaintiff’s counsel submitted the court does not grant orders in vain. Accordingly the court is moved and persuaded to grant the orders as prayed. Before concluding the ruling the 2<sup>nd</sup> Defendant did seek the striking out of the affidavit of Cecil Guyana Miller on the basis that he failed to state his place of abode. That failure to my mind is not fatal to the affidavit for indeed the deponent gave his address which address is shown to be in the city of Nairobi. Further I am in agreement with the Plaintiff’s counsel that this is an irregularity which can be cured by Order XVIII of the Civil Procedure Rules and therefore the affidavit can be accepted in support of the Plaintiff’s application. On the 2<sup>nd</sup> Defendant’s submission that failure to attach a receipt of the auction sale was fatal. I beg to disagree at this argument I am of the view that the letter of the auctioneer to the registrar of motor vehicles suffices to justify this court to be moved. The court is of the view that the Plaintiff’s application was necessitated by the Plaintiff’s counsels failure to file papers in relation to the said sale of the subject motor vehicle. As a consequence of that finding the court is of the view that the costs of the said application should be paid by the Plaintiff to the 2<sup>nd</sup> Defendant. The court accordingly in view of what is stated here before grants the following prayers:-

1. The court grants a review of the orders contained in the ruling dated 12<sup>th</sup> July, 2006 and the review granted is restricted to the following orders:

- **“That the Plaintiff is estopped from selling, transferring or registering to any person motor vehicle registration No. KAQ 076Z.**
- **That the Plaintiff do forthwith release vehicle registration No. KAQ 076Z to the 2<sup>nd</sup> Defendant.**
- .....
- **That the certificate of costs hereof is hereby set aside....”**

2. That the application dated 18<sup>th</sup> May, 2006 shall be re-heard to the extent of the prayers granted in (1) above at a date to be fixed by the parties at the reading of this ruling.

3. The court will entertain an oral application by any party in regard to any further papers that the parties may wish to file in regard to the re-hearing of the application dated 18<sup>th</sup> may, 2006.

4. The costs of the application dated 25<sup>th</sup> July, 2006 are awarded to the 2<sup>nd</sup> Defendant.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 22<sup>nd</sup> day of September 2006.

**MARY KASANGO**

**JUDGE**