



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 293 of 2004**

**WORLD WIDE FUND FOR NATURE (EASTERN AFRICA REGIONAL OFFICE).....  
PLAINTIFF**

**VERSUS**

**FIONA MOTORS LTD. ....  
DEFENDANT**

**R U L I N G**

This is an application expressed to have been made under the provisions of Order XLIV Rules 1 and 2 of the Civil Procedure Rules; Sections 34 and 80 of the Civil Procedure Act and all other enabling provisions of the law. The application which is by the plaintiff seeks the following order apart from costs:-

**(i) That this court be pleased to review the consequential order herein to provide that the handing over of the documents of the three (3) motor vehicles do constitute delivery of the motor vehicles.**

The primary grounds for the application are as follows:-

- 1. That there is an error apparent on the face of the record in that the court erroneously ordered the plaintiff/applicant to hand over the three (3) suit motor vehicles to the defendant/respondent whereas the plaintiff/applicant had in its possession only one (1) of the suit motor vehicles.**
- 2. That during trial PW1 and PW3 had testified that the plaintiff had in its possession only one (1) of the suit motor vehicles; the other two (2) suit motor vehicles having been in the custody of the Customs and Excise Department of the Kenya Revenue Authority.**
- 3. That the plaintiff/applicant attempted to physically deliver the one (1) suit motor vehicle in its possession to the defendant/respondent together with the documents for the other two (2) motor vehicles but the defendant/respondent refused to take delivery of the same stating that she wanted all the three (3) motor vehicles delivered to her.**
- 4. That after the futile attempt by the plaintiff/applicant to deliver to the**

**defendant/respondent the one (1) suit motor vehicle in its possession the said motor vehicle was subsequently impounded by the Customs and Excise Department of the Kenya Revenue Authority.**

**5. That the consequential order made by the court requiring that the plaintiff/applicant do hand over the three (3) suit motor vehicles to the defendant/respondent can never be actualized because the plaintiff/applicant is not in possession of and cannot in future have possession of the three (3) suit motor vehicles because they have all been impounded by the Customs and Excise Department of the Kenya Revenue Authority.**

**6. That there exists sufficient reason to review the judgment and decree herein as the facts pertaining now are radically different from those at the time of the trial and judgment.**

The application is supported by an affidavit of one George Atisa, the Administration and Operations Manager of the plaintiff/applicant. Annexed to this affidavit are several annexures which include a copy of the decree and correspondence exchanged. The application is opposed and there is a replying affidavit sworn by one Silvyu Wanjiru Merie, the defendant's Managing Director.

After hearing arguments from Mr. Otiso, learned counsel for the plaintiff and Mr. Chege, learned counsel for the defendant, I reserved my ruling. The substance of the plaintiff's complaints can be considered under two main heads. The 1<sup>st</sup> and primary head is that there is an error apparent on the face of the record and the second and in my view secondary head is that there exists sufficient cause to review the judgment and decree herein.

Regarding the complaint that there is an error apparent on the face of the record the plaintiff's contention is that the order to hand over the three (3) suit motor vehicles was made in error because only one motor vehicle was in the possession of the plaintiff, the other two having been in the custody of the Customs and Excise Department of the Kenya Revenue Authority. The plaintiff's further contention is that even the one motor vehicle that was in its possession at the time of trial and judgment has since been impounded by the same department of Customs and Excise. The plaintiff had attempted to physically deliver this latter motor vehicle to the defendant before it was impounded but the defendant had refused to take delivery of the same insisting that all the three (3) motor vehicles be delivered together. As a consequence of the actions of the department of Customs and Excise, the order requiring the plaintiff to hand over to the defendant the three (3) motor vehicles can now not be complied with.

I have read my judgment again and I confess I have not been able to detect the error complained about. I found, as proved on a balance of probabilities that the subject motor vehicles were cleared by the plaintiff and were received by the plaintiff. The plaintiff's primary concern was that the delivered motor vehicles did not meet their specifications. The plaintiff was further concerned about delayed delivery. Possession of the subject motor vehicles was not really in serious contention. The plaintiff not only took delivery of the motor vehicles but its officers indeed had the motor vehicles valued. The plaintiff's evidence was unequivocal that the defendant refused to take back the vehicles when requested to do so. In the premises, I have no doubt in my mind that there is no error apparent on the face of the record.

Has the plaintiff shown some other sufficient reason for review of the said judgment and decree? The plaintiff contends that there now exist facts that are radically different from those obtaining at the time of trial and judgment and for that reason review of the judgment and decree should be ordered. If I understand the plaintiff correctly, the radical difference now is that the subject motor vehicles are now in the possession of the Department of Customs and Excise of the Kenya Revenue Authority. I am unable to appreciate this argument. How can the impounding of the motor vehicles by the Department of Customs and Excise amount to other sufficient cause to review a judgment and decree based on entirely different circumstances? Whatever complaints the plaintiff may have against the impounding of the subject motor vehicles, the complaints cannot certainly be resolved in a review application. In my view, unfavourable consequences of a judgment decree or order would not normally constitute sufficient cause for review.

On the whole, I find and hold that the applicant/plaintiff has not established any of the conditions set out in Order XLIV Rule (1) of the Civil Procedure Rules for the grant of a review of the judgment and

decree herein. The application has no merit and is dismissed with costs.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 19<sup>TH</sup> day of SEPTEMBER, 2006.**

**F. AZANGALALA**

**JUDGE**

**19.9.2006**

Read in the presence of:-