



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE MISC. APPL. NO. 303 OF 2002**

**ALCON INTERNATIONAL LTD. .... PLAINTIFF**

**VERSUS**

**DAVID OMBABA BASWETI ..... DEFENDANT**

**RULING**

By an application dated 6th September 2002 the applicant seeks orders that:-

- 1. That the motor vehicle Lorry Mercedes - Benz Prime Mover Prime Mover registration number KWE 491 and Mercedes Benz Truck with model No. 1622 held by M/s Gallant Auctioneers or their agents be seized and delivered to Alcon International Limited.**
- 2. That M/s Gallant Auctioneers give a full account to the court and to the parties herein on their conduct of the matter.**
- 3. The court do make orders as to who bears the storage charges.**
- 4. The applicant do make such orders as it may deem fit to grant.**
- 5. The respondent pays the applicant full costs incurred to date.**

The application is based on the grounds that:-

- 1. There is an order by this Honorable Court on the 25th April, 2002 for the release of the said motor vehicles and to which the Respondent and M/s Gallant Auctioneers and/or their agents have failed to comply with.**
- 2. The applicant has suffered and continues to suffer business loss as the said motor vehicles being Mercedes Benz with crane model No. 1622 and Mercedes Benz Prime Mover registration number KWE 491 are still being held by M/s Gallant Auctioneers and the Respondent or their agents despite a Court Order issued on 25th April, 2002 that the same be released to the applicant. Unless the motor vehicles are released forthwith, such loss shall be irrecoverable from the Respondent who is not a man of means.**
- 3. The applicant deposited a sum of Ksh.665,675.60 in this Honorable Court being the full decretal sum as ordered by this Court on 25th April, 2002 and being security for the release of the said motor vehicles pending and determination of the Civil Appeal number 172 of 2002.**
- 4. The Applicant has paid a further sum of Ksh.20,000/= to the Respondent's advocates being their costs as at 25th April, 2002 in the suit in the lower court.**

**5. The ends of justice will be defeated in the event these Orders are not issued.**

**6. Contained in the annexed Affidavits of DAVINDER SINGH HANSPAL and FRED K. ATHUOK advocate respectively and on other grounds and reasons to be adduced at the hearing hereof.**

The application is predicated upon the annexed affidavit of

DAVINDER SIGHN HANSPAL and FRED K. ATHUOK advocate respectively.

For the applicant it was argued that an order was granted by this court for the release of the subject and other vehicle to the applicant but to date, the respondent and M/s Gallant Auctioneers are still withholding the same. A copy of the order was exhibited as "FKAI".

That with a view to having this matter resolved amicably counsel for the applicant has written several letters both to the respondent's advocate – M/s Mose & Mose advocates – and the Auctioneer, M/s Gallant Auctioneers to no avail. Copies of the said letters were exhibited and marked "FKA 3".

It was the applicants case that on or about 30th April 2002, M/s Gallant Auctioneers wrote to M/s Issack Ibrahim and informing them that they had sold one of the motor vehicles and recovered decretal sums and paid all the expenses. A copy of the said letter was exhibited as "FKA 3".

That in June, the applicant's counsel discovered that storage charges had not been paid to the said Auctioneers and that no account in respect of the expenses were rendered as alleged with the result that the subject motor vehicles have not been released to the applicant to date.

For the respondent it was argued that the subject motor vehicles (unregistered) – Mercedes Benz Truck with crane model No. 1622 – was sold vide public auction on 25th April, 2002 at Leakey's Storage Service at 11.00 a.m. in execution of the decree/Judgment herein and hence is no longer in the Auctioneer's custody.

Exhibited on behalf of the respondent in proof of such sale is a bundle of documents marked "JMG 2".

That the subject motor vehicle was sold to a Mr. Amrick Singh Heer of P.O. Box 14381 Nairobi and at the time of sale the said Auctioneer had not been served with any court order. Upon sale, the Auctioneer informed the applicant's advocate and advised them to notify the judgment – debtor to collect the remaining motor vehicle. That such communication was done vide exhibit "JMG 3". That neither the applicant nor his advocate have collected the remaining motor vehicles to date despite numerous demands as per exhibit "JMG 4".

That the Auctioneer advised the applicant's advocates that they would pay the storage charges for KWE 491 from the date of attachment up to 30th April, 2002 and that the judgment debtor would pay the other charges. See exhibit "JMG 5".

That in those circumstances the sale of the aforesaid motor vehicle was procedural and done within the confines of the law. The warrants have already been returned to court and the Auctioneer given accounts in respect of the sale. I have carefully listened to and understood the rivalling arguments. It is common ground that the subject motor vehicles were attached and were in custody of M/s Gallant Auctioneers as at 25th April, 2002.

Mr. Jesse M. Gitau an Auctioneer trading under the name and style of Gallant Auctioneers in his affidavit sworn on 27th September 2002 at paragraphs 3 and 4 depose that the motor vehicle (unregistered) Mercedes Benz Truck with crane model No. 1622 was sold vide public Auction on 25th April, 2002 at 11.00 a.m. That at the time of auction the said Auctioneer had not been served with any court order and had not been served as at 27th September, 2002.

I have perused the affidavit of service of Jackson K. Isaac sworn on 25th May, 2002. At paragraph 2, 3 and 4 the process server says he received copies of court order from the applicant's advocates on 24th May, 2002 and served the same on 25th May, 2002 at 8.00 a.m. Sale, according to the respondent took place on 24th April, 2002 while service of the court order was on 28th May, 2002 slightly over one month.

In those circumstances the Auctioneers never floated court order, the sale was therefore in order. If there were other anomalies with respect to the sale, like gross undervaluation, then the applicant is entitled to bring a suit for damages as enjoined by the relevant law. In the disclosed circumstances of the case the only order which commends itself to me is the order that the applicant do collect forthwith Lorry Mercedes Benz Prime Mover Registration Number KWE 491 unconditionally. For purposes of clarity the applicant shall not pay storage charges. It is so ordered.

**DATED and DELIVERED at NAIROBI this 31 st day of JANUARY 2003.**

**N.RO. OMBIJA**

**JUDGE**

**Mr. Athuole: Applicant**

**Mr. Mose: Respondent**