



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 335 OF 2001**

1. E.J. AUSTIN  
2. N.E. AUSTIN  
3. AUSTIN & PARTNERS LTD.....PLAINTIFFS

VERSUS

1. KIM JONG KYU  
2. CHON JEUM SUK KIM.....DEFENDANTS

**RULING**

**Introduction**

1. There is before the court for determination a Notice of Motion dated 9/9/2010 merely seeking a determination by the court on who between the plaintiff and defendant, should pay the auctioneers fees.

**Outline of facts**

2. After the warrants of attachment and sale were issued by the court to MAKINI AUCTIONEERS AGENCIES on 19.11.2008 there was conditional order to stay of execution but the court never set aside the warrants nor did it make any affirmative finding on any impropriety on the part of the Auctioneer. For that reason, the auctioneer has sought to be paid by the two antagonistic parties but none is committing to meet the auctioneers costs hence the application for the court to settle the dispute.

**Issues, analysis and Determination**

3. The application as framed and filed seeks from the court only one answer; as between the plaintiff and the defendant, who should pay the auctioneers costs? That question has an outright and straight forward answer when due consideration is given to the Auctioneers Act and the Rules made thereunder.

4. Rule 7 of the Auctioneers Rules provide:-

**Payment of auctioneer's charges**

**A debtor shall pay the charges of the auctioneer unless:-**

**a) That debtor cannot be found or**

**b) He has no goods upon which execution can be levied; or**

**c) The sale proceeds are insufficient to cover the charges, in which cases the creditor shall pay the charges or the deficiency thereof.**

5. In this matter it is not dispute that the auctioneer did proclaim and attached the property of the judgment-debtor in execution of the decree and that the execution was conditionally stayed by the court, which order did not make a provision for payment of the auctioneers fees.

6. The law as embodied in the Rules is that it is the judgment debtor to pay the auctioneer costs unless the three conditions set under the rule were met. In this case, none of the conditions were met hence it remains that it is the judgment debtor to pay.

7. To this Court, it cannot be said that it was the decree holder plaintiff who instructed the auctioneer. My understanding of the warrants of attachment and sale, as know under the Civil Procedure Act, is that it is the court which issues the warrants upon the application by an advocate for the decree holder. The decree-holder's advocate doesn't appoint an auctioneer, it merely recommends an auctioneer but the actual appointment is by the court which commands the auctioneer on what to do and within what time to effect the execution and return to warrants to court.

8. To that extent, the auctioneer is an appointee of the court and that is the sole reason why an auctioneer is by the provisions of section 23 of the Act obligated to act in a manner befitting of an officer of the court.

9. In conclusion the law says and I must abide by the law, that the judgment debtor pays the auctioneer fees. In this case it is ordered that the judgment-debtors as disclosed in the warrants of attachment and sale dated 19/11/2008, KIMJONG KYU and CON JEUMSUK KIM, shall pay the auctioneers fees.

10. I award to the auctioneer the costs of the application dated 9.9.2010 which for the purposes of bringing this otherwise long outstanding matter to an end, I assess at Kshs.20,000/=.

11. It is so ordered.

**Dated at Mombasa this 23rd day of February 2017.**

**P.J.O. OTIENO**

**JUDGE**