



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO.86 OF 2016**

**LOCHAB TRANSPORTERS LTD.....APPELLANT**

**VERSUS**

**FANUEL KAMBONA MUTESA.....RESPONDENT**

**RULING**

By a notice of motion dated 28.7.17 brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 45 of the Civil Procedure Rules, Article 159 of the Constitution and all enabling provisions of the Law; the appellant/applicant prays for orders:-

- 1) THAT this application be certified urgent and service thereof be dispensed with at the first instance***
- 2) THAT pending the hearing and determination of this application, this Honourable Court be pleased to stay execution of the decree herein***
- 3) That the court be pleased to review its orders dated 15.6.17***
- 4) THAT costs be provided for***

The application is based on grounds among others that:-

- a. There is an error apparent on the face of the record on the issue of jurisdiction of the auctioneer
- b. There is evidence in the record of appeal from the Auctioneers Licensing Board that the auctioneer did not have jurisdiction to attach in Nairobi

The application is also supported by an affidavit sworn on 28th July 2017 by Eric. O. Ojuro, advocate for the applicant in which he reiterates the grounds on the face of the application. Annexed to the affidavit is this court's judgment delivered on 15th June 2017 (**E001**) and a letter dated 5.6.14 from the Auctioneers Licensing Board which shows that the auctioneers had jurisdiction to practice in Kisumu, Busia, Kisii, Siaya and Migori (**E00 2**).

The application is opposed on the grounds set out in a replying affidavit sworn by the 2nd respondent Paul Oketch on 23rd August 2017. He avers that the application is not merited since the issue of jurisdiction of the auctioneer has been determined by both the Magistrate's court and this court.

I have considered the application in the light of the supporting affidavit and the grounds of opposition. Order 45 of the Civil Procedure Rules provides that:

**(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.**

The issue in question is whether the judgment delivered on 5.3.14 has a mistake or error apparent on the face of the record.

In his affidavit sworn on 2nd November 2015, the 2nd respondent deposed that the applicant's goods were proclaimed in Mumias and not in Nairobi. The applicant insists that the proclamation was done in Nairobi.

In a judgment delivered on 15th June 2017, this court held:-

***“As rightfully observed by the learned trial magistrate, it was upon the appellant to prove that the warrants of attachment and sale were executed in Nairobi which was outside the jurisdiction of Pambo Investments Auctioneer, a burden that it failed to discharge”.***

The letter dated 5.6.14 from the Auctioneers Licensing Board clearly confirms that the auctioneers did not have jurisdiction to practice in Nairobi and that his jurisdiction was confined to Kisumu, Busia, Kisii, Siaya and Migori only. The foregoing notwithstanding; letter *per se* does not liberate the applicant from discharging the burden to prove that the warrants of attachment and sale were executed in Nairobi and not Mumias as averred by the auctioneer. It is a common law principle that *whoever asserts must prove*, but not *he who denies, must prove*. The principle is firmly embedded in the **Evidence Act, Cap 80 of the Laws of Kenya** which stipulates that;

**“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

The upshot of the foregoing is that the applicant has not made out a case for review and the notice of motion dated 28.7.17 is considered and found to have no merit and it is dismissed with costs to the 2nd respondent.

**DATED AND DELIVERED THIS 21st DAY OF September 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Appellant N/A

Respondent **Ms Wafula holding brief for Mr Odeny**