



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL CASE 368 OF 2001**

**DR. DANIEL CHEBUTUK ROTICH.....1<sup>ST</sup> PLAINTIFF**

**MORGAN KIMASET CHEBUTUK (Minorsuing through his father and  
next friend DANIEL CHEBUTUK ROTICH).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EMIRATES AIRLINES.....DEFENDANT**

**RULING**

I have before me in this matter an application under **Order 44 Rule 1(1)** of the **Civil Procedure Rules** by M/S Legacy Auctioneers (the Applicants) for the review of Justice Musinga’s order of 7<sup>th</sup> February 2007. The application is based on the grounds that there is an apparent error on the face of the record; that the applicants’ rights were adjudicated upon in their absence and that the Applicants stand to suffer loss and prejudice unless the said order is reviewed.

I have read Justice Musinga’s ruling the final order of which the Applicants wish to have reviewed. It was a ruling on the defendant’s application for a declaration that it was not reliable to pay the auctioneers bill dated 30<sup>th</sup> October 2006. After setting out the facts of the case the Honourable Justice Musinga found that as the decretal sum in this case was in a joint deposit in the names of the advocates for the parties, there was no warrant whatsoever for the plaintiff to have applied for execution. All that they required to do was to set in motion the machinery to have the amount in the joint account released to him. Instead of doing that the plaintiffs’ advocate applied for execution which was subsequently set aside.

Order 44 Rule 1 of the Civil Procedure Rules is very clear on the grounds upon which a review can be sought. They are where a party has discovered new and important matter or evidence which was not within his knowledge at the time the decree or order was passed although he had been diligent; or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The applicants appear to rely on the second and third of these grounds.

On the first ground, the applicants have not specified the mistake or error apparent on the face of the record. Having read the ruling I cannot myself discern any. That ground therefore falls a cropper. By contending that their claim was decided in their absence and that they will suffer loss and prejudice if the said order is not reviewed the applicants appear to base their application on the last ground of any sufficient reason. This ground must also fail. It is not by inadvertence that in his ruling of 7<sup>th</sup> February 2007 the Honourable Justice Musinga did not say who was to pay the applicants costs. He was alive to that fact and he failed to provide for the applicants costs because that issue was not before him.

The defendant’s said application that it was not liable to pay the auctioneers charges was served upon the applicants but for unexplained reasons the applicants did not appear to oppose that application or seek to be heard as to who should pay their costs. They cannot therefore be heard to say that they were condemned unheard or that they will suffer loss and prejudice if that order is not reviewed. They should have appeared before the Honourable Justice Musinga and urged him to provide for their costs.

The applicants having not proffered any explanation for their failure to appear before the Honourable Justice Musinga, I find no sufficient reason to warrant a review of the Judge's said order. Consequently I dismiss this application with costs.

DATED and delivered this 11<sup>th</sup> day of June, 2009.

**D. K. MARAGA**

**JUDGE.**