



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. 161 OF 1999**

**KIMANZI KIENYI ::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**SAMSON MUTUNGA MUTHELA ::::::::::: RESPONDENT**

**R U L I N G**

The application dated 5.7.2001 is brought under Rule 7 of the Auctioneers Rules 1987 seeking orders that the court reconsiders its order of 5.7.2001 ordering the applicant to pay auctioneers charges and vacate the same as it is contrary to law and procedure and that the court do make other such orders as to serve the ends of justice. It is the applicants contention that the order made on 5.7.2001 offends provisions of Rule 7 which provide that a debtor shall pay the charges of the auctioneer unless the debtor can not refund or where a debtor has no goods upon which execution can be levied or that the sale proceeds from the debtors goods shall not be sufficient to cover the charges. It is the contention of Counsel for applicant that the court made an error by ordering the applicant to pay auctioneers charges as the respondent does not fall under the exceptions listed under Rule 7 which would warrant the applicant to be called upon to pay the auctioneers charges.

The application was opposed and Mr. Mbiti Advocate for respondent filed an affidavit in opposition. The thrust of the opposition is that no error was made by the court in its ruling of 5.7.2001 and if indeed there had been such an error Counsel for applicant should have pointed it out which he had not and that this application offends provisions of Order 44 Rule 7 as the court is being asked to act as an appellate court on orders made by the same court. It is also contended that the circumstances under which a judgement/debtor is called upon to pay costs are different from the present.

A brief background of this case is that appellant had filed an application for stay of execution pending appeal in this matter which was stay for costs of Ksh. 28,000/-. The court granted the orders and ordered the costs in the lower court to abide the outcome of the appeal and the attached goods were to be released and Ksh.5000 paid to auctioneers was to be deposited in court pending determination of the appeal. The court observed that there was no copy of the decree in the memorandum and it was not said whether the court gave a go ahead to execute for costs alone. After the above order was made the Auctioneer moved the court under Order 44 Rule 1, Order 21 Rule 25 Civil Procedure Code seeking to review the court's order of 12.7.2000. As the said order had not stated who would pay the Auctioneers charges, the court ordered the present applicant to pay the auctioneers charges as he had set the ball rolling.

The court observes that the applicant has not invoked this courts jurisdiction properly. What he is seeking is a review of the court order of 5.7.2001 in which applicant was ordered to pay auctioneers charges. It is not in order that the applicant only cited Rule 7 of Auctioneers Act as the provision of law under which to bring this application. This application does offend provisions of Order 44 Rule 7 which provides that no application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained. The order made on 5.7.2001 which the applicant seeks to have reviewed was given by this court following an application for review of orders of 17.7.2000. I do agree with Mr. Mbiti for respondent that the applicant was disguised and came to court under Rule 7 of Auctioneers Act without citing Order 44 which provides for review intentionally because ideally the applicant should have appealed against the Order of 5.7.2001.

Counsel for Respondent cited the authority of **Carter and Sons Ltd. vs. Kenya Finance Corporation C.A 62/93** in which the Court of Appeal ruled that a party affected by the court's order must be served. I do find that the authority is relevant in that infact the order sought to be reviewed had been obtained by the auctioneers. If it is reviewed it directly affects the auctioneers. They should have been served and

been a party to this application.

As regards the issue of whether the court made an error in its finding and ruling on 5.7.2001, that the applicant do pay the auctioneers charges, it is my view that the court had correctly ruled the costs abide the appeal. That is so because the result of appeal may be different from that of the lower court. It would be premature to order that defendant do pay such charges. The court had also observed that the decree was arising from the memorandum and it was not clear whether execution was for only costs.

The court's ruling was correct in the circumstances and I find no error on the record. I find that the application improper, lacks merit and is hereby dismissed with costs to the appellant/respondent.

Dated, read and delivered at Machakos this 4th day of May, 2004

**R. V. WENDOH**

**JUDGE**