

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.159 OF 2004**

**PETERSON MOKAYA ABUTA APPELLANT
VERSUS
SANSORA GROUP RESPONDENT**

RULING

Counsel for the Respondent raised a Preliminary Objection to the application by the applicant/appellant and stated that the application is shown to have been brought under Order 21 rule 78 (d) 3 C. P. R. He submitted that there is no rule like that in the Civil Procedure Rules. Further he said Order 21 rule 78 itself deals with situations where there is sale of moveable properties which is not the case in the present case.

Further he submitted that the hearing of Notice to Show cause which was sought to be stayed was to be on 12th July 2004 which is long gone. The application does not seek stay of execution pending hearing of the appeal.

Mr. Okenye told court there was an error about the rule under which the application was brought. He however said they cited S.3A CPA.

I have considered the preliminary objection and the reply thereto. I find the objection has merit. Indeed there is no rule as Order 21 rule 78 (d) in the Civil Procedure Rules. The application is therefore brought under a non-existence Order and rule. Though Mr. Okenye submitted that there was an error he did not tell court under which order and rule he thought his application should have been brought under.

Certainly, as submitted it could not be under Order 21 rule 78 CPR as that rule deals with immovable property.

Applicant cannot hide under S.3A CPA unless if he tells court that there is no rule which his application could be brought under. The rules were not made for nothing and it is for a party to come to court under the proper Order and Rule. The applicant has not done that.

I therefore uphold the preliminary objection and dismiss the application with costs.

Dated at Kisii this 24th September 2004.

KABURU BAUNI

JUDGE.

24/9/04