



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELC CASE NO. 17 OF 2012**

**MOSES CHEGE NGANGA .....PLAINTIFF**

**VERSUS**

**LUCY MUTHONI KIMANI.....DEFENDANT**

**RULING.**

The applicant herein **Moses Chege Nganga** has brought this Notice of Motion dated 28<sup>th</sup> March, 2013 for Orders that this Court do review its Orders given in the Ruling made on 7/3/2013 and that the court do set aside the said orders issued on 7/3/2013 and costs of the application be awarded.

The application was premised on the followings grounds. That the applicant filed a Notice of Motion dated 16/11/2012 which was duly argued before this Court. That further the Court delivered its ruling on the said application on 7/3/2013 allowing the Defendants Notice of Motion in terms of prayers No. 2 and 3. That the said prayers were prejudicial against **M/s Muhatia Auctioneers** who are not parties to this suit.

The applicant further averred that there is an error apparent on the face of the record as the Court issued orders against **M/s Muhatia Auctioneers** who were neither parties to the suit nor named as the respondent before the Court. That the Court issued adverse orders against **M/s Muhatia Auctioneers** before hearing the said auctioneers or requiring that they be served with the application.

That the court issued adverse orders against **Ms Muhatia Auctioneers** without jurisdiction to do so and the application was brought against the wrong party . The application was also supported by the affidavit of **Moses Chege Nganga**.

The application was opposed. The **Respondent Lucy Muthoni Kimani** put in grounds of opposition.

The Respondent alleged that the application is misconceived and there is no new and important matter to warrant the Court to review its orders.

Further there is no error apparent on the face of record and the application is an abuse of the Court process as it is a disguised appeal.

The application was canvassed orally. I have considered the instant application and the oral submissions and I make the following findings:-

In the Notice of Motion dated 16<sup>th</sup> November, 2012 that culminated in the Ruling of 7/3/2013 which the applicant seeks to review, the applicant then, who is the Respondent herein had sought for an Order of injunction against the plaintiff's agents. **M/s Muhatia Pala Auctioneers.**

The Court made its Ruling and made orders restraining the Plaintiff's agents **M/s Muhatia Auctioneers.** The orders that were issued by the Court were against the Plaintiff's agents. The orders were not against a party that was not in the suit but against the plaintiff's agents.

The applicant has premised his application upon section 80 of the Civil Procedure Act. The said Section provides that:-

“Any person who considers himself aggrieved

(a) By a decree or order from which an appeal is allowed by this Acts, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed by the Act may apply for review of Judgement to the Court which passed the decree or made the order and the court may make such order thereon as it **thinks fit.**

The applicant herein has stated that the order issued by this Court on 7/3/2013 aggrieved him as it was made against a party in the suit who was not a party .However, the Court Order was against the plaintiff's agents. From the various correspondences, in the file, **Ms/ Muhatia Auctioneers** had been instructed to levy distress on the Respondent personal effects. **M/s Muhatia Auctioneers** was therefore an agent of the plaintiff and the Orders issued by the Court were against the plaintiff's agent. There is therefore no error apparent on the face of the record.

Applicant stated in his submissions in court that the court should review its orders issued on 7/3/2013 because there is an error apparent on the face of record.

However, this court finds that Orders were correctly issued against the Plaintiff's agents and reasons were given as to why those Orders were issued. The court therefore, finds that the applicant has not made any discovery of new and important matter, which were not within his knowledge and there is no mistake on the order issued on 7/3/2013.

The applicant has not demonstrated any error APPARENT on the face of record. The Court finds no reason to review its orders issued on 7/3/2013 and or set it aside.

The Plaintiff herein gave **M/s Muhatia Auctioneers** instructions to levy distress against the Respondent herein. **M/s Muhatia Auctioneers** was therefore an agent of the Plaintiff and that agent is the one who was restrained by the Court. As was held in the case of **Direct Domestic Appliances Ltd Vs Nile Breweries ltd ( 2008)/EA Pages 88.b**

“ Agency is a Fiduciary relationship which exists between two persons one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties and the other similarly consents so as to act or so acts”

The action of *M/s Muhatia Auctioneers* to attach respondent's goods which emanated from instructions from Plaintiff affected the Respondent herein.

For the above reasons, the Court finds that the applicant's application has no merit and the same is an abuse of the Court process as it is an appeal disguised as an application for review. The said *M/s Muhatia Auctioneers* has not complained to Court. The Court issued an order that the goods should be released unconditionally and the issue of auctioneers fees should not feature or be used as a reason not to abide by the Court Orders.

Application dated 28/3/2013 is consequently, dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed, and delivered this 5<sup>TH</sup> day of JULY 2013.

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

Mutua For the Plaintiff/Applicant

Okemwa holding brief for Kabue for the Dependant/Respondent

**L.N. GACHERU**

**JUDGE**

**5/7/2013**