



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

Civil Appeal 30 of 2000

**SOFIA
MUTHONI.....
.....1ST
APPELLANT
VIRGINIA MUTHONI
GACURU.....
.....2ND APPELLANT**

VERSUS

**MICHAEL MUNENE
KABURU.....
.....1ST RESPONDENT
JOHN KITHIGA
MWAI.....
.....2ND RESPONDENT
JOSPHAT MUCHIRI
RUGANO.....
.....3RD RESPONDENT**

RULING

Ms Wairimu of Rugaita & Co Advocates filed the application dated 3/8/2009 under order XLIV Rule 1 (1) of the Civil Procedure Rules and Section 3 A and 27 (1) of the Civil Procedure Act. She is asking the court to review the orders made by Hon. J.N. Khaminwa in her ruling dated 21/1/2008 on costs. She asks that this court instead makes an order that the costs of the application dated 6/3/2007 and the costs of this Application be borne by the Respondent in the Appeal.

Mr. Magee for the Respondents filed grounds of opposition citing 2 grounds;

- (a) that the application is incompetent and bad in law in that it enjoins a 3rd Respondent without the leave of court and;**
- (b) That there is a already an appeal lodged against the ruling of 21/1/2008 in the Court of Appeal in Civil Appeal Number 122 of 2008 and this application is therefore incompetent.**

I have considered the application and Ms Wairimu's affidavit in support of same. I have also considered the

grounds of opposition cited above.

I have also carefully read the ruling of **Judge Khaminwa** from which the said order was extracted.

On the issue of the 3rd respondent being joined without leave, I note that all 3 respondents appear in the ruling by **Justice Khaminwa** and even in the proceedings before **Judge Tuiyot** (as he then was) ten years ago.

I do not know when that person was joined as a party but if there was a problem with bringing him on board, the objection should have been raised way back before **Judge Tuiyot**. The parties as they appear in this application are the same parties that appear in the Judgment of **Judge Tuiyot** dated 4/9/2001. That objection has no basis whatsoever.

On there being an appeal pending. I note that the said appeal would have nothing to do with the review of the said order and the same does not effect the outcome of the pending appeal.

Going through **Judge Khaminwa** ruling it is clear that she was referring to the appellants in the Court of Appeal case who were the applicants in the application giving rise to the contested ruling. She did not therefore err when she said that the costs be borne by the appellants in this appeal- who are the Respondents in the Court of Appeal. The flow of her ruling clearly shows her intent. It was the appellants before the Court of Appeal who were the applicants in the application dated 6/3/2007 who had filed the appeal before the Court of Appeal and who were directed to come back her and file a formal application for leave.

Their application was dismissed and **Judge Khaminwa** found inter alia that a delay of 6 years was inordinate. There is no way therefore she could have meant or intended to award the same appellants/ Applicants costs while they were the ones clearly at fault.

I am satisfied that the Hon. Judge meant the appellants before the Court of Appeal who were the applicants herein. There is therefore an error on the face of the record in her ruling which this court has jurisdiction to correct.

I therefore allow the application and amend/correct the order on costs by **Judge Khaminwa** to read Appellants in the Court of Appeal/Applicants in application dated 6/3/2007.

I order that each party bears its costs of this instant application because the ambiguity or error in the Judges ruling was not occasioned by either party.

Delivered, signed and dated at Embu this 10th day of May 2010

W. KARANJA
JUDGE

In presence of:-

Ms Kimani for Ms Wairimu for applicant.