

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Appeal 53 of 2009

THOMAS OTIENO MBEWA

APPELLANT

VERSUS

WILLIAM OKOTH ABATHA)

Legal Rep. Estate of VALENTINE) RESPONDENT

ABATHA AWUOR HOMA BAY)

TEACHERS CHILDREN SCHEME)

RULING

When the Respondents were served with this application they sought to defend it and filed both Grounds of Opposition and a Replying Affidavit. Under **Order 50 r 16(1)** of the **Civil Procedure Rules** they were entitled to file either of them, but not both. The Applicant noticed the lapse of the part of the Respondents and was going to take up the point at a preliminary stage. The Respondents now seek to withdraw the Grounds of Opposition in order to be left with the Replying Affidavit. **Mr. Otieno** for the Applicant opposes the request to withdraw and wonders under what provisions of the law the request is being made. **Mr. Osoro** for the Respondents indicated he was making the application under **Order 24 rule 2** of the **Civil Procedure Rules**. It is basic that those provisions don't apply. But, like I said in the foregoing, the Respondents have demonstrated an intention to oppose the main application. I am mindful that courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline (**Chemwolo and another vs. Kubende [1984] LLR 219 (CAK)**). There is no error or default that cannot be put right by payment of costs. **Section 3A** of the **Civil Procedure Act** exists for the purpose of making sure that the wider interests of justice are taken care of.

I allow the request by the Respondents to withdraw the Grounds of Opposition, but ask them to pay costs.

DATED at KISII this **29th** day of **May**, 2009.

A. O. MUCHELULE

JUDGE