



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

**AT ELDORET**

**Civil Case 10 of 2000**

**DAVID CHEPTUM SAWE ..... PLAINTIFF**

**VERSUS**

**JONAH KIPSAINA CHEROTICH ..... 1<sup>ST</sup> DEFENDANT**

**WILSON KIMUTAI CHEROP ..... 2<sup>ND</sup> DEFENDANT**

**KIPRONO ARAP TOROITICH ..... 3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**R U L I N G**

At the resumed hearing of this suit, Mr. Rotich for the 4<sup>th</sup> and 5<sup>th</sup> Defendants referred to the recently published Gazette Notices 299 and 300 by the Honourable Chief Justice and dated 19<sup>th</sup> January, 2006. Mr. Rotich stated that he wished to take instructions as to whether to grant the Attorney General's consent as contemplated by Order 46 of the Civil Procedure Rules.

Gazette Notice No. 300 has directed that the Courts ensure compliance and enforcement of the provisions of Order 46 Civil Procedure Rules. This Court is bound by the provisions of Order 46 and the directions in Gazette Notice No. 300. I wish to point out that the provisions of Order 46 of the Civil Procedure Rules are not new and have been in existence since 1957 vide legal Notice No. 299 of 1957. The new Gazette Notice No. 300, Clause 5 in my view is a reminder by the Honourable Chief Justice that the said provisions ought to be enforced.

For the moment, I do not wish to make a finding in respect of all civil matters that are pending at Eldoret High Court Registry. I wish to restrict my decisions, comments and/or observations to the matter before me.

This case was filed sometime in January, 2000. It is exactly seven (7) years old. It has been heard over the said period and the Defence has called 3 witnesses. The case is almost at an end. The Attorney General did not object to the trial taking place at Eldoret. They have participated in these proceedings throughout and there has been no objection or reference to Order 46.

In the event this Court enforces Order 46 in a blanket manner in respect of part-heard cases, many

innocent litigants before this court will suffer great loss and injury in terms of loss of precious judicial time and expense.

The Attorney General on behalf of the Government in these proceedings actively has participated in these proceedings. While there is no written consent by the Government as to the place of trial, yet there has been “active acquiescence” by the Attorney General. I do hereby hold that the Attorney General has “given” the Government’s consent by conduct and by submitting to the jurisdiction of this court. No objection was raised in their Defence.

With respect, the Counsel for the Attorney General cannot now place this Court at the mercy of the Government. To accept that the trial of this case take place anywhere else would amount to a travesty and miscarriage of justice. This Court shall not allow that to happen.

I therefore reject the notion that the Government’s consent is again necessary. The Government gave its consent when it allowed the trial to take place at Eldoret and allowed it to proceed for seven (7) good years.

I will now give a date for further hearing.

DATED AND DELIVERED AT ELDORET ON THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2007.

M. K. IBRAHIM

JUDGE