



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 990 of 1999**

**KUTIMA INVESTMENTS LIMITED ..... PLAINTIFF**

**VERSUS**

**MUTHONI KIHARA ..... 1<sup>ST</sup> DEFENDANT**

**COMMISSIONER FOR MINES AND GEOLOGY ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

By a Ruling dated 26<sup>th</sup> April, 2005 the Hon. Mr. Justice Kihara Kariuki struck out the Plaintiff's suit. Thereafter, the Plaintiff obtained certain restraining Orders pending the hearing and determination of its appeal to the Court of Appeal. These restraining Orders were made by a different Judge, Justice Ransley, presumably because at that time Justice Kihara was out of station for a considerable length of time, attending to other Judicial duties. Ordinarily, though, in my view the file would have been placed before him to make whatever orders he deemed appropriate, subsequent to the striking out of the suit. In his absence, it was quite proper that the matter was placed before another Judge. Now, the Defendants were aggrieved by those "subsequent" Orders made by Justice Ransley, and filed an application under a Certificate of Urgency to set aside the same, among other things. That application came before me, as the Duty Judge, on 16<sup>th</sup> June, 2006. I certified the same urgent, and ordered the same to be served and placed before Justice Kihara for further directions. At that time I did not give reasons for exercising my discretion to place the file before Justice Kihara.

When the parties appeared before Justice Kihara on 28<sup>th</sup> June, 2006, the Counsel for the Plaintiff/Respondent strongly argued that the application to set aside should not be heard by Justice Kihara, who then referred the file back to me to outline my reasons for preferring that the matter be heard by him. The purpose of this Ruling is, therefore, to outline my reasons for placing the file before Justice Kihara.

Obviously, both Counsels had strong reasons for their respective positions, and I agreed to hear their submissions before issuing further directions. First, let me say, that the Duty Judge's decision to refer the file to any Judge is a discretionary one, and the discretion should be exercised judiciously, bearing in mind practical common-sense and prudence. This case is old and complex. The size of the file is rather daunting. It seemed eminently practical to me that the Judge who is familiar with the file, and one who has dealt with it substantively, should be the one to deal with it in relation to any subsequent orders that might be sought. To do otherwise would engage another Judge in a huge time exercise, and unduly tax our already highly taxed resources. I cannot quite comprehend why the Counsel for the Plaintiff would be so vehemently opposed to the same Judge dealing with the matter, unless of course he is looking for a second bite of the same cherry. It would not be appropriate for me to allow Counsels to shop around for Judges. That would set a dangerous precedent. Now if Mr Rachuonyo wants Justice Kihara to disqualify himself from hearing this matter, it is for him to make that application and for the Judge to hear it on merit. There is no point telling this Court that should I return the file to Justice Kihara, he would be forced to make such an application. He should do exactly that. But he should not expect me to pre-empt the outcome of that application. And that certainly is no ground not to return the file to the same Judge.

I see absolutely no reason and basis in the submission made by Mr Rachuonyo, and hereby re-affirm my decision of 16<sup>th</sup> June, 2006 when I referred this file to Justice Kihara Kariuki for further directions.

Dated and delivered at Nairobi this 8<sup>th</sup> day of August, 2006.

**ALNASHIR VISRAM**

**JUDGE**