



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: AKIWUMI, SHAH & LAKHA, JJ.A.)**

**CIVIL APPEAL NO. 129 OF 1997**

**BETWEEN**

**1. MUTUA VUVI**

**2. MUTUNE MUSYOKI**

**3. KALEE MUTUA .....**

**APPELLANTS**

**AND**

**TITUS NGUI MUTISYA .....**

**RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at  
Machakos (Justice Torgbor) dated the 9th day of  
November, 1990**

**in**

**H.C.C.C. NO. 7 OF 1987)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appeal is against the decision of the learned Judge (Torgbor J) of the superior court where he refused to review his confirmation of the award made by the arbitrators on a matter which had been ordered by the learned judge to be arbitrated upon. In doing so, the learned judge acted on his own without the parties having first agreed to the matter being referred to arbitration which are the mandatory rules provided for this purpose by section 59 of the Civil Procedure Act and O 45 r 1 of the Civil Procedure Rules. In the result, the order of the learned judge referring the matter before him to arbitration was a nullity and any acts performed on the basis of this order including those of the learned judge, are a nullity. The decision of the learned judge appeal against is likewise a nullity.

We must therefore allow this appeal with costs and order that the position as ordered by Platt J as he then was, shall be maintained.

**Dated and delivered at Nairobi this 29th day of May, 1998.**

**A. M. AKIWUMI**

**JUDGE OF APPEAL**

**A. B. SHAH**

**JUDGE OF APPEAL**

**A. A. LAKHA**

**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.  
DEPUTY REGISTRAR.**