REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. E023 OF 2020

1. NURU RUGA ALI

2. NASSORO HAMISI KEA NYERERE ***(legal representatives of the Estate of***

SALIM HAMISI KEA).....APPELLANT

VERSUS

1. THE COMMODITY HOUSE LIMITED

2. WYCLIFFE OTWOBI

3. MARS LOGISTICE LIMIED

4. EDWIN KIPTOO.....RESPONDENTS

(Being an appeal from the entire Ruling and Order of Hon Mr S.K.Ngii of the

Senior Resident Magistrate's Court at Mariakani dated 18th day of November, 2020

in SRMCC No. 451 of 2017)

CORAM: Hon. Justice R. Nyakundi

Kanyi J Advocates for the Appellants

Wambua Kilonzo Advocate for the Respondent

J U D G M E N T

Feeling aggrieved and dissatisfied with the impugned Ruling and Order dated 18.11.2020 passed by the trial court at Mariakani for declining an adjournment and subsequent dismissal of the suit, the Appellant preferred an appeal.

> The facts leading to the present appeal in a nutshell are as reflected in the record but can be summarized as follows;- ***That as per the cause of action a plaint dated 18.10.2017 and thereafter filed in Court on 24.10.2017 seeking damages in tort was initiated against the Defendant by the administrators Nuru Ruga Ali and Nassoro Hamisi Kea Nyerere as legal representatives of the Estate of Salim Hamisi Kea.***
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> ***As pleaded in the Plaint on or about 19.1.2015 the deceased was lawfully travelling aboard the 1st Defendant motor vehicle registration number KAX962 G ZB 9249 along Nairobi-Mombasa Road. That upon reaching Samburu, the 2nd Defendant so negligently and carelessly drove the said vehicle permitting the vehicle to swerve, and in order to avoid a collision with the 3rd Defendant's motor vehicle registration number KBU 911 52D 5971 and being so negligently driven caused the deceased to be thrown off the vehicle as a result he sustained fatal injuries, loss and damage.***

For purposes of this appeal the case has delayed far too long, but the court in exercising discretion terminated the entire suit for lack of candor and due diligence on the part of the Appellant. That dismissal of suit is at the heart of this revision. The question to be answered is

whether that judicial discretion to decline further adjournment and subsequent dismissal of the suit was meritorious.

Determination

The Law

Whether on revisionary jurisdiction or appeal the duty and task of the court is as expressly stated in the case of ***Mbogo V Shah [1968] EA*** in which ***De Lestang*** held thus;-

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion"***

Though premised as an appeal I will contend by invoking the overriding objective under section 1A & 1B and Section 3A of the Civil Procedure Act to exercise revisionary jurisdiction on this interlocutory matter. My reading of the entire act and Civil Procedure Rules apparently has no specific provision or rule that enables the Courts to dispose of matters by way of revision. This purposeful approach is expressly provided for in the realm of the criminal law in terms of section 362 of the Criminal Procedure Code. The relevant provisions which provides an entry point on revisionary jurisdiction would be section 1A and 1B of the Civil Procedure Act on overriding objective and section 3A of the Act on inherent jurisdiction.

It is beyond contention that our Civil Procedure Act lacks clarity in conferring express jurisdiction upon the High Court on revisionary power and authority to exercise it over subordinate courts. The closest one gets is Article 165 (6) and (7) of the Constitution which states as follows;-

> ***"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over superior court."***

For purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person body or authority referred to in clause (6) and may make any orders or give any direction it considers appropriate to ensure the fair administration of justice. The ratio *decidendi* of the revisionary jurisdiction as properly provided for in this Article of the constitution is to decide on matters in which no appeals lies or is not an absolute necessary as an avenue to redress the wrong complained of by a litigating party. The effect of this jurisdiction is succinctly explained by a full bench in ***K.B.Sipahi Malani V Fidahussein Valleyboy [1962] 58 B.L.R 344*** is for the court to call for the record of any case before a subordinate court to satisfy itself as to the legality, propriety regularity and justness of the order complained of so as to invoke the power of revision to interfere or make direction to meet the ends of justice.

This jurisdiction between the appeal and subsequential question on revision the principles which emerge are that;-

> ***a) The Court can interfere if the subordinate appears to have exercised a jurisdiction not vested in it by law, or***
>
> ***b) To have failed to exercise a jurisdiction so vested , or***
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> ***c) To have acted in the exercise of its jurisdiction illegally or with material to irregularity. That Court may make such order in the case as it thinks fit.***

The question then is whether the learned trial magistrate of the lower court in this case in the exercise of his jurisdiction acted illegally or with material irregularity in declining an adjournment and as a consequence occasioned an injustice to the appellant.

The present case falls squarely within the principles in ***Anisminic Ltd V Foreign Compensation Commissioning [1969]2 AC 147***.

The Court held that;-

> ***"But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature. That its decisions is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirement of natural justice it may be perfect good faith have misconceived the provisions giving it power to act so that it failed to deal with the question related to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account, or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account."***

I do not intend this case to be exhaustive in the same case ***Lord Pearce*** said;-

> ***"Lack of jurisdiction may arise in various ways. There may be an absence of these functions or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry or the tribunal may at the end make an order that it has no jurisdiction to make, or in the inter viewing stage while engaged on a proper enquiry the tribunal may depart from the rules of natural justice, or it may set itself the wrong questions, or it may take into account matters which it was not directed to take into account thereby it would step outside its jurisdiction."***

It is discernible that there is a very important distinction between revisionary and appellate jurisdiction. The benefit to the legal system on revisionary jurisdiction in criminal adjudicatory process is clear and does pass the test of delivery real time resolutions of grievances and complains raised by either parties on matters arising within the proceedings. The nature and extent of the problem to be solved by revisionary jurisdiction on an action placed before the Court prevents at all times in all circumstances stringent conditions for appeals to be filed, admitted and scheduled for hearing and determination.

In that case the jurisdiction and the power of revision can be exercised under the broad rubric of criteria set out therein under section 1A, 1B & 3A of the Civil Procedure Act a drawn down from the inherent power of the Court to vary or set aside impugned orders emanating from the subordinate Courts which necessary do not require the laborious process of an appeal under order 42 of the Civil Procedure Rules.

On the applicability of the overriding objective principle the courts in the;-

> ***Estate of Halima Wamukoya Kasabuti V Orient Commerical Bank Ltd CA No. 302 of 2008(UR 199/2008) Kariuki Network A Ltd & Another V Duly & Figgs Advocates' CA NO. 293 of 2009. The question we have to ask ourselves is whether we can take refuge under the oxygen rule enshrined in section 3A and 3B of the Appellate Jurisdiction Act (Supra) which underpins the overriding objective principle introduced in the appellate jurisdiction in 2009, long after the appeal subject of this Judgment had been filed in order to breathe life into an otherwise incurably defective appeal as per the contention of the respondent.***
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> ***On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. (See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008); The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the case of Kariuki (Supra); that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepak Manlal Kamani and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009); that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004); that the overriding objective principle is intended to re-energize the process of the court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are 2" compliant (see the case of Hunter Trading Company Limited versus ELF Oil Kenya Limited, Civil Application No. Nai 6 of 2010 (UR3 (2010); that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR). And, lastly, that the "O2" principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case of Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR) 62 of 2010.***

I think I have said enough on this fundamental procedural jurisdiction. That as it may be I have a christened appeal to evaluate and determine so how has the appellants faired in their quest to overturn the impugned decision.

When one considers the record before the trial court in its entirety it is clear that none of the parties has ever been heard since the filing of the suit in 2017. The procedure and protocols on case management that incorporates adjournments as one of the tools expressly provided for in the Civil Procedure to aid the Court in adjudication of disputes and administration of justice was used as a means to extinguish the rights of the litigants who set in motion the claim in Court.

The mere fact that the appellants had applied for adjournment previously does not mean he was not entitled to a trial on the merits. The term substantive justice under Article 159 (2) (D) of the Constitution cover a range of obligations and duty to the Court to be insulated with a foresight to administer justice against the backdrop of the right to a fair hearing under Article 50 of the Constitution . Legal author and scholar ***Sir William*** in dealing with a legal system and substantive justice in his book ***(History of English Law 3rd Edition Vol 11 -251)*** had this to say;-

> ***"One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedural rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and a technical system that the decision of cases turns almost entirely upon the workings of its rules and only occasionally and unconditionally upon the merits of the cases themselves".***

It may also be noted that judges sitting in a position of authority have a duty in following the oxygen rule and its cannons as expressly stated in terms of section 1A and B of the Civil Procedure Act. Of great significance is the power of the Court under Article 50 (1) of the constitution to receive evidence either oral, affidavit, submission or depositions, material on the issues to hear and determine them on the merits. When considering the orderly processing and screening of cases by Courts at various levels it is demonstrably justified to rely on the principles of governance and national values as expressly provided from under Article 10 of the Constitution. It may be legitimately said that incidental to Article 10 the vexed question on the rights of the parties must be leveraged in the context of Article 50 on the right to a fair hearing and Article 159 (2) & (d) & (e) in so far as that justice shall be administered without undue regard to procedural technicalities and the purpose and principles of this Constitution shall be protected and promoted. These Articles highlight the risk of the combined effect of discretion and the use of summary procedure in search of meaning of the right to begin the trial and conclude it without unreasonable delay.

From a partly substantive stand point the ***Supreme Court in Raila Odinga & 3 Others V IEBC 20(3) eKLR*** made the following commentary in reference to Article 159 (1) of the Constitution; -

> ***"The court as an agency of the process of justice is called upon to appreciate all the relevance conscious and the requirements of a particular case and conscientiously determine the best course"***

By that one Act by the Learned trial Magistrate performed on 18.11.2020 the whole suit was struck out summarily that it had embarrassed the judicial process for staying in queue since 2017.

At the issue in the appeal was first the legality of the dismissal of the suit for want of prosecution but more particularly whether it was open at that stage for the court to drive the parties one of the seat of justice. I entertain the procedural safeguards in the administration of justice but there is no doubt that under our constitution and statutory provisions the dismissal clause in the Civil Procedure Rules is a course of last resort. I am of the view that the duty carried out by the Learned Trial magistrate did not justify the striking out of the suit. That power as observed in the case of ***Dobie & Company(Kenya) Ltd V Joseph Muchina & Another CA No.37 of 1978 and the Co-operative Merchant Bank Ltd V George Fredrick Wekesa CA No.54 of 1999*** is a draconian act, which may only be resorted to in a plain case whether or not a case is plain is a matter to be viewed form the holistic approach in the circumstances and facts of the case. With reference to instant case the formulation of the principles in ***Microsoft Corporation V Mitsumi Garage Ltd & Another Nairobi HCC 810 of (2001) (2001) EA 460*** is administrative as follows;

> ***"Rules of procedure are the hand maids and not the mistress of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rules requiring verification of a plaint but has fallen short of the presented standards, it would be to elevate form and precedent to fetish to strike out the suit. Deviations, from, or lapses in form and procedure, which do not go to jurisdiction of the Court or prejudicial not to the adverse party in any fundamental respect ought not to be treated as nullifying and the legal instruments, thus effected. In those instances, the Court should rise to its calling to do justice by saving the proceedings in issue."***

From the cases cited there can be no doubt that summary procedures of adjournment are likely to violate Article 50 of the Constitution on the right to be heard and adduce evidence or challenge the claim in a civil suit. The justification as explained by the Learned trial Magistrate in his ruling of denying any further canvassing of the issues was due to the dilatory conduct of the appellants. The issue as reflected by the Court is one of momentous import on the rights contained in the Constitution. In support for the appellants' case, I find the dicta from the neighboring jurisdiction more precisely Uganda in the case of ***Tiberio Okeny & Another v The Attorney General & 2 Others C. A. Civil Appeal No. 51 of 2001***:

> ***(a). First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.***
>
> ***(b). The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should necessarily debar a litigant from pursuit of his rights.***
>
> ***(c). Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.***
>
> ***(d). Unless the appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.***
>
> ***(e). Where an applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law……. It is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors……."***

The question arises whether where rights compete, it is in the spirit of the Constitution and Statutory Law to decide a matter in issue in a manner which is likely to occasion prejudice and unjust outcome. In deciding the question of this nature, Courts have been given guidance on a common human failure and the Courts should be prepared to take judicial notice of it. According to the Court of Appeal in ***Phillip Keipto Chemwolo & Another v Augustine Kubende [1986] KLR 495***:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits."***

Furthermore the recognition was echoed in ***Banco Arabe Espanol v Bank of Uganda [1999] 2 EA 22 by the Supreme Court of Uganda*** that:

> ***"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."***

The relevant issues in this case raises concerns on the failure of the trial court in maximizing the provisions under Order 11 of the Civil Procedure Rules on pretrial conferences primarily intended to simplify issues, make sensible on the trial management disclosure on witness statements, documentary or physical evidence and implementation of time scheduling for hearing and determination of the issues on the

merits. Ones again, if in the course of monitoring compliance with procedural time scheduling two versions of laches exist pointing at the guilt of the parties and the other to the failure of the trial Court to manage the process of determining the claim without unreasonable delay, it's not right to condemn one party against the other.

The actual notice and an opportunity to be heard was left to the whim and caprice of the parties to control the pace of litigation. This aspect of the appellants' argument allegations that he was not heard fairly by virtue of the dismissal order is to me a breach of both procedural and substantive justice guaranteed by the basic instruments of governance in the administration of justice.

The instant claim had been pending before Court for some time and thus being a claim with high stakes between the claimant and defendant on award of damages in tort certainly, the adverse party will seize every opportunity to frustrate the trial. At this juncture, it is apt to reiterate the position taken in the persuasive jurisprudence in the matter of ***Hailulu v Anti-Corruption Commission & Others [2191] [2009] NAHC 187 The Namibian Court*** observed:

> ***"The principles for the consideration of a postponement application are settled: an application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. An application for postponement must be bona fide and must not be used as a tactical manoeuvre. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained and is not due to delaying tactics. The overriding considerations in the courts exercise of the discretion whether or not to grant a postponement is the need to do 'substantial justice' between the parties. The court is principally concerned with one question: what is the prejudice to be suffered by the party adversely affected by the postponement and can it be cured by an appropriate order of costs? It must now be accepted as settled that it is unacceptable to assume that as long as the opponent's prejudice is satisfactorily met with an appropriate costs order nothing else matters. In the litigation process, litigants and their legal practitioners have a duty not only towards each other but also towards the court and the interests of the administration of justice. A litigant's duty is to avoid conduct that imposes a supererogatory cost burden on the opponent. The duty towards the court and the interests of the administration of justice has two aspects to it: the first is the convenience of the judge assigned to hear the case and the second is the proper functioning and control over the court roll. When an indulgence is sought from the court, the litigants' duty towards the court and the interests of the administration of justice was stated as follows by this court:***
>
> ***"The grant of an in indulgence for failure to comply with rules of court or directions is in the discretion of the court – to be exercised judicially. Lack of prejudice to the opposing party is an important consideration in assessing whether or not to grant condonation – but in this day and age it cannot be the sole criterion. In my view, the proper management of the roll of the court so as to afford as many litigants as possible the opportunity to have their matters heard by the court is an important consideration to be placed in the scale in the court's exercise of the discretion whether or not to grant an indulgence…." It is a notorious fact that the roll of the High Court is overcrowded. Many matters deserving of placement on the roll do not receive court time because the roll is overcrowded. Litigants and their legal advisors must therefore realize that it is important to take every measure reasonably possible and expedient to curtail the costs and length of litigation and to bring them to finality in a way that is least burdensome to the court." (own emphasis added).***

As regards the contention by the respondent, fairly stated due to the weighted elements and prevailing system issues justice in Kenya is administered in a non-ideal world. The constrains litigants face towards the realization of justice require the collaboration and discipline across the main actors to the suit, especially with regard to compliance on time scheduling of events in case management. Yet, I will argue here that it is only natural and ideal for the trial Court to have declined adjournment to stop the prosecution of the cause of action. On scrutiny of the record and ultimate dismissal order it brings into question the ideal and non-ideal world in the administration of justice in our country.

I believe, there is value in the philosophy for Courts to endeavor in practical terms to promote the ideals of equality of arms and the right to a fair hearing under Article 50 of the Constitution. In other words, the law in incorporating sanctions distribution is a guiding tool for the Courts to move parties towards more desirable judicial setting to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. **(See Section 1(A) and 1(B) of the Civil Procedure Act).** The Court is therefore charged with the task of exploring the contributions and limits of the ideal and non-ideal world of justice delivery in Kenya.

In my view, the way to integrate ideal and non-ideal world is for the Courts to be reflective of the litigation history of the suit and the impending action on postponement and seek an equilibrium of the two levels to do substantive justice to the disputants. This decision by the trial Court puts forward the paradox of an ideal world of justice which begins by exploring the capacity of our legal system to administer justice without unreasonable delay. The ideal principles of expeditious delivery of justice is at the heart of our own Constitution in Article 50 and 159 (2) (b). It must be noted that the Constitution frowns and abhors delay within the justice system. That implies faster justice is better justice. To achieve the goal on expeditious case processing timelines parties must commit by having their case addressed upon within the framework of the Civil Procedure Rules in order to meet the objective of first in, first out case flow management policy. The size of case dockets in Kenya has been quite significant. The numbers continue rising but literally unmatched with the number of Judges and Magistrates. One of the most important observations in this appeal, which ought to be emphasized not everyone was on the same page.

To summarize in a similar vein, a useful paradigm shift that can be approached is an inquiry on the legitimate rule of administration of justice that the sins of Counsel should not be visited upon an innocent party not within the physical jurisdiction of the Court. In other words, not only do litigants shift responsibilities to their respective Counsels upon retainer to exclusively manage and control the pace of litigation effectively as structured by our legal system, but that does not mean they are in tandem with the rate and speed of their matters filed in various Courts.

Whether justice is delayed is justice denied appears to depend on whether unrepresented parties or respective advocates appearing on behalf of their clients do undertake proceedings arising thereto in accordance with the interest of justice. The advocate of the High Court being the mouthpiece of his or her client can ensure sound public administration of justice as conferred by the Constitution is a delivery expeditiously. In the sense therefore, administration of justice means the process through which justice is delivered to the people or the actual act organizing

the process. *(Paraphrased: According to the Oxford Advanced Learners Dictionary on the definition of administration).* It should be noted though the administration of justice and organization of the process of justice delivery is the core function of the Judiciary but the resolution of it, is admittedly contributed by various actors to the justice system. The rationale for the above proposition is for the Courts in executing their Constitutional mandate to ensure existence of very strong grounds in dismissing any pending cause of action.

It seems to me however, the judicial powers of the Court in exercising discretion based on this rich principle that sins of Counsel should not be visited against a litigant effectuated on aspects of blunders, mistakes, negligence, omissions, lack of due diligence to the extent of non-compliance in addressing matters in Court ought to have been resolved in favor of the appellants. It follows therefore, that is a feature which provides a basis for this Court to interfere with the decision of the trial Court.

The whole concept of justice should be a measure of exercising discretion as attributable to what Rawls identifies as a deviation from perfect justice. In his explanation Rawls observed interalia as follows:

> ***"Viewing the theory of justice as a whole, the ideal part presents a conception of a just society that we are to achieve if we can. Existing institutions are to be judged in the light of this conception and be held to be unjust to the extent that they depart from it without sufficient reason."***

What is the right current metric in matters of this nature raised by the appellant?

It's for the court to refrain from punishing litigants for mistakes, or blunders made by their advocates without demonstrating that the claimant to the suit was equally guilty of laches. With that we will as a constitutional democracy bound by the rule of law obtain a standard of justice with which we can reasonably expect compliance in idealizations of substantive justice. Courts are established by the authority of the sovereign as the fountain of justice, their ancillary powers to regulate its procedure and protect its proceedings should not be applied in a draconian manner to deny litigants a right to access Court under Article 48 and a right to a fair hearing under 50 of the Constitution, unless in substantial and compelling circumstances.

For these reasons, I will set aside the Ruling of the trial Court and substitute it with an order that the civil suit **SRM NO. 451 OF 2017 at MARIAKANI LAW COURTS** be re-opened and the parties to the claim canvass the issues on the merits. In the circumstances, I will allow the appeal with costs to the respondents to abide the outcome of the primary suit. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 6TH DAY OF AUGUST, 2021

.....

R. NYAKUNDI

JUDGE

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